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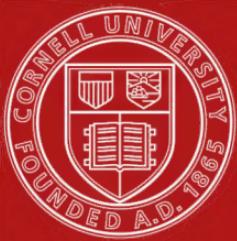
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A treatise on the doctrines of res adjud



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A TREATISE

ON

THE DOCTRINES

OF

Res Adjudicata and Stare Decisis.

John C. Wells,
BY J. C. WELLS,

AUTHOR OF "QUESTIONS OF LAW AND FACT, INSTRUCTIONS TO JURIES,
AND BILLS OF EXCEPTION," "SEPARATE PROPERTY OF
MARRIED WOMEN," ETC.

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PREFACE.

THERE is no distinct treatise of which I am aware that is exclusively devoted to a consideration of the important topics embraced within the range of *Res Adjudicata*, and of the maxim *Stare Decisis et non quiesca mouere*. As to the former, it is true the books on the subject of Estoppel deal with it in outline as a part of the general treatise. But it has become so extended that a full and at least partially exhaustive treatment has, I think, become desirable, tracing out the various distinctions, ramifications, modifications, exceptions and diverse bearings thereof; and such is the object and especial mission of the following work.

I have purposely confined myself to the American decisions, and have only incidentally quoted English authorities now and then for the sake of clearer illustration. In my judgment the American system of jurisprudence has acquired sufficient consistency to stand alone in general, and is not now as formerly in leading strings humbly following without question the authority of English precedents. However, the English system being the origin of ours, there must always remain similarities in the two whereby one will readily lend illustration to the other upon almost any legal topic—so that there is no impropriety in mingling both in discussions of principles entering into the composition of legal text books.

The two topics of *Res Adjudicata* and *Stare Decisis* may properly be treated together, being of a cognate character, the former controlling parties, the latter more especially furnishing a rule for courts themselves, in those matters which have been judicially considered, and are afterward again brought forward to be passed upon. In general, however, there is this distinction likewise, that the former more usually relates to determinations on questions of fact, the latter to decisions on questions of law. But this distinction does not destroy the classification which renders the two topics capable of being considered together logically and systematically.

* Hoping my labors herein may not prove unacceptable to the profession, I commend the work to their favor and indulgence.

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RES ADJUDICATA.

CHAPTER I.

GENERAL PRINCIPLES AS TO RES ADJUDICATA.

- Section 1. The Doctrines of Res Adjudicata and Estoppel.
2. Res Adjudicata bears upon Parties and their Privies.
 3. How the U. S. Supreme Court Defines Res Adjudicata.
 4. Rule Applied either to Cause or Particular Facts.
 5. The Fundamental Principles of the Rule.
 6. Act of the Court is Conclusive.
 7. Line of Distinction between Cases.
 8. An Amusing Case in Maine.
 9. Failure to Appeal Conclusive.
 10. What might have been set up.
 11. Judgment Conclusive Evidence of Right.
 12. Qualifications of the Rule.
 13. Judgment must go to the Merits of the Controversy.
 14. Must be a Final Settlement of the Matter Adjudicated.

SECTION 1. Why the doctrine of *Res Adjudicata* should ever have been regarded as a branch of the law of estoppel, will have to be explained by wiser heads than mine. It is very easily conceivable how a party may be estopped by the recitals of a deed, or by certain acts or conduct on his part which may have induced action on the part of another person, or by any doings or omissions of his own, and wholly under his own control. As to recital by deed, it is of course reasonable that the reciter be held to it, and not be allowed to contradict it to the injury of another. As to act or omission —

estoppel in pais—it is just and reasonable that one shall not be allowed to induce any acts or expenses of another, and then reverse his behavior to the injury of that other; that is to say, it is the office of an estoppel to prevent fraud arising from the conduct of any one against the interests of his neighbor. But I see no more propriety in saying that a party to a judgment is estopped thereby than to say that a party to a promissory note or bond is estopped by the binding legal obligation to which he is thereby held. And so of any other legal liability. I think it highly important, in a science so vast and intricate as the law, to employ terms in a sharp, incisive, technical definition to prevent confusion and bewilderment. Hence, I object to the application of the term estoppel to the conclusiveness of a judgment—which is derived not from the immediate act of a party, but rather from the solemn act of determination by a competent court—because in such application the term loses all distinctive meaning, or at least takes on a signification so hazy and indefinite as to confuse the proper ideas naturally pertaining to the subject. My caveat, however, will probably be unavailing in this behalf, and I shall have to be content with honestly protesting against the foggy vagueness now enveloping the term and adding to the intricacy of legal study, by just so far, an additional burden; as our tenderly fondled silent letters embarrass and hinder the attainment of correct orthography by even the most attentive student.

SEC. 2. The doctrine of *Res Adjudicata* chiefly bears upon parties and others privy to the immediate parties, and restrains them from litigating anew such matters as have previously been drawn into controversy between them or those representing them, and have been authoritatively decided by a competent court. However, this definition is strictly applicable as a general rule to judgments *in personam*, and not to judgments *in rem*, properly so called. The latter class of judgments are conclusive “against all the world,” as it is commonly expressed, as to the status of the property therein involved, while usually strangers to the record are permitted to dispute what has been determined before between the immediate par-

ties. However, there are exceptions to this last clause which will be noted in their proper place hereafter.

SEC. 3. In a certain case (wherein, however, one of the justices dissented on the point that the conclusiveness relates to matters of fact only) the Supreme Court of the United States in part defined the doctrine of *Res Adjudicata* in the following language: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact. But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."¹

SEC. 4. The rule is applicable either to an entire cause or to particular facts in issue in a former adjudication. If it be applied to an entire action, then it is a bar in full; if to particular facts, then conclusive evidence so far as it goes²—for a suit may embrace different principal issues, or else principal and subordinate issues.

¹*Packet Co. v. Sickles*, 5 Wall., 592. On what grounds Justice MILLER dissented does not very clearly appear, since the opinion of the majority does not seem to conflict with his position, as the previous case of *Goodrich v. Chicago*, in the same volume, proves, which decided that a case raised on a demurrer involving the merits is likewise subject to the rule.

²*Spencer v. Dearth*, 43 Vt., 105.

SEC. 5. The fundamental principle of the rule *Res Adjudicata* is plainly that the decision of a court of competent jurisdiction is and ought to be a final and conclusive settlement of the questions involved in any particular controversy as to the parties concerned therein, and as to any title claimed through or under those parties, so that if a fact has been once directly tried and determined by such court, the same parties cannot properly be again allowed to contest the same matters, either in that court or in any other; and also, that a judgment on such questions or facts in legal form is perfect evidence of its own validity. And more especially, if the court has a peculiar and exclusive jurisdiction relative to such matters, its judgment should be binding upon the judgment of any other court acting on the same matter — always provided that it has acted thereon within the proper limits of its jurisdiction³ — for random adjudications have no claim to conclusive respect.

SEC. 6. An essential principle also is that the action of the court is conclusive, even if it could be shown to be erroneous, unless in a direct action to reverse the judgment by appeal or by some other legal method as to the parties and the issues. On this matter the New Hampshire Supreme Court remarks: "It is a well established principle that the judgment of a court of record having jurisdiction of the cause and of the parties, is binding and conclusive upon parties and privies in every other court until it is regularly reversed by some court having jurisdiction for that purpose. Notwithstanding the proceedings may be erroneous, yet as between the parties the judgment must stand until regularly vacated or reversed. Where a court has jurisdiction, it has a right to decide every question which arises in the cause, and whether its decisions be correct or otherwise its judgment, until reversed, is regarded as binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter. The only way for them to investi-

³*Holcomb v. Phelps*, 16 Conn., 131, and cases cited.

gate such a judgment is by a re-hearing of that cause, either by writ of error or by some other legal and direct mode. For, to the extent to which the judgment goes, their rights have been considered and decided, and they have submitted to that decision either from the force of law after a final hearing by a court of last resort, or from a disinclination to pursue the matter further when other courses of proceeding for re-hearing were open before them and might have been had if they had so elected. Upon this point the authorities are numerous and decisive.”⁴

SEC. 7. And as to the line of distinction between cases which may be wholly disregarded by reason of their inherent nullity, and such as, though properly entertained, are yet erroneous in the proceedings or result, the Supreme Court of the United States say: “The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or a decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matters adjudicated, or purporting to have been so. In the one case it is a record importing absolute verity; in the other mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error.”⁵ I am not sure that this language though mainly just is not a shade too strong, under the distinctions of void and voidable judgments, to be hereafter specified.

SEC. 8. An amusing case arose in Maine, where certain judgments had been obtained and stood unreversed, and the defendant, in an uncontrollable fit of frantic vexation, afterward went charging around like a wounded elephant upon all he could find, and so brought an action of trespass against the plaintiffs then living, and the representatives of those who had died since the judgments had been rendered, as also against

⁴*Hollister v. Abbott*, 11 Foster, 448.

⁵*Voorhees v. U. S. Bank*, 10 Pet., 474.

the principal attorney and against the officers who had served the writs, charging them all with conspiring together to wrong, injure and defraud him. The court had no course open but to hold that he could not thus indirectly bring on a re-consideration of the causes he had failed to vacate in the way provided, and accordingly to set him outside to cool.⁶

SEC. 9. It does not matter that the evidence on which the former judgment was based had been improperly obtained. If it were acquiesced in by a failure to appeal, or if an appeal were ineffectually taken, it is nevertheless conclusive, and constitutes a positive and immovable bar to another suit on the same cause of action.⁷

SEC. 10. We merely notice here another general principle, which with the rest will be more particularly explained in subsequent chapters, namely, that all matters which the parties might have urged before the adjudication was closed, are usually to be held concluded by the judgment as to the principal parties and their privies in interest or estate. For example, where a plaintiff claimed that he had been induced to consent to a non-suit and a judgment of costs against him when in a state of intoxication, it was held too late to present such claim in a subsequent suit upon recognizance against the bail, the bail being regarded as a privy.⁸

SEC. 11. Attempts have been sometimes made to establish the position that a judgment is not conclusive, but only *prima facie*, evidence of right. But this cannot be supported on principle as a general proposition, nor is it supported by authority. The New Hampshire Supreme Court has well stated the logical consequences of such a rule, if it were to prevail, showing not only that it would unsettle everything, but would involve an inherent logical absurdity. “The operation of such a rule would be to authorize the introduction of the verdict of one jury in evidence, not to show that the matter in question had been tried and settled, but to influence the minds

⁶ *Smith v. Abbott*, 40 Me., 446.

⁸ *Parkhurst v. Sumner*, 23 Vt., 541.

⁷ *Kelley v. Mize*, 3 Sneed., 61.

of a jury having a similar question before them, to find the fact in the same way that the former jury found it, upon the faith that the first jury was capable, and duly investigated the subject upon competent proofs, and therefore probably found the fact correctly. It is quite evident that the weight to be given to it in that view is entirely uncertain. In order to understand its true value and the weight which ought to be given to it in establishing the matter in question and on trial, the capacity of the former jurors should be shown, and the manner of the trial, that it must appear how distinctly the proofs and arguments were laid before them; for, otherwise the second jury could not know whether the case was fully presented. And to all these there should be added a statement of the grounds on which the former jury proceeded in making up their verdict. It is only upon evidence of this character that the jury, to whose consideration the verdict and judgment are offered as a matter of evidence which should have some influence in determining the disputed fact, can have any reasonable idea how much weight they ought to attach to it; but this evidence they cannot have. If a verdict and judgment are admitted as evidence of any matter tried and found, they furnish evidence that it has passed in *rem judicatam*. If so, that is not a matter to influence a jury, or not, according as opinion, whim or caprice, or even as a sound judgment respecting the competency of the former jury to judge may dictate. As a mere fact, it has no bearing upon the merits of the case in connection with other matter to show the truth of the facts previously found, because it is not a fact which occurred in connection with such other facts, but is of itself a conclusion or result from the consideration, or trial, or admission of such other facts, or some of them. As evidence to show that the matter in controversy between the parties has been considered settled and passed into judgment, it is conclusive.”⁹

SEC. 12. The rule then is that a judgment is conclusive as between parties and privies in any subsequent suit. But it is

⁹ *King v. Chase*, 15 N. H., 13.

to be understood as subject to this qualification in general, that the questions are such as were direct or essential to the prosecution or defense, and that it appears from the record, or else from extrinsic proof, that the judgment was in reality based upon them—except where matters which might have been presented for judicial decision in the first case were withheld, and are subsequently excluded on that account. A judgment may be reversed when proper by the direct methods provided by law for appeals, etc.; but if it is not so reversed, whether any attempt to effect such purpose be made or not, the parties are not to be allowed again by judicial proceedings to deny either the facts or the law upon which the former case proceeded.¹⁰

SEC. 13. But again, it is an essential requisite of a conclusive judgment that it should go to the merits of the controversy in hand, and hence must not be based merely upon technical defects in the pleadings. Otherwise, as a general rule, it will not bar a subsequent action upon the same subject-matter by the same parties. For example, if the foundation of a suit is the right of property, and the matter actually adjudicated relates only to a particular form of remedy, it is evident that the real question of the right of property is still *res integra*, not being adjudicated. The merits are not involved, for if a certain form of action be improper, there may be another one wholly unobjectionable.¹¹

SEC. 14. And the judgment accordingly must be final; and briefly summing up the essential qualities of *Res Adjudicata*, “there must be a suit, *actor reus, judex*, and the judgment must be final; that is, it must settle the matter which it purports to conclude. Again, the thing demanded must be the same, the demand must be founded upon the same cause of action, the demand must be between the same parties and found by them against each other in the same quality.”¹²

¹⁰ *Birckhead v. Brown*, 5 Sandf., 145.

¹¹ *Johnson v. White*, 13 S. & M., 587.

¹² *Dumford's Succession*, 1 La An., 93.

Besides, there must have been a real trial of the matter at issue, and it would seem the trial must have been fairly conducted.¹³ And it is not always held sufficient that by inference or *arguendo* the same point must have been considered.¹⁴

Such is a general statement of the outlines of the doctrine of *Res Adjudicata*. To explain the application of the principles thus summarily presented, with the modifications, exceptions and legal results, is the task now before us in the succeeding chapters of the present work.

¹³ *Burnham v. Webster*, 1 W. & M., 188.

¹⁴ *Greeley v. Smith*, Id., 184.

CHAPTER II.

OF RES ADJUDICATA IN REGARD TO PARTIES.

Section 15. Statement of Subject.

16. Who are Parties.
17. Nominal and Real Parties.
18. Character of Real Parties.
19. Whether Parties must be same in Number.
20. Relative Position of Parties.
21. Same Capacity.
22. Illustration by Example.
23. Rule of Parties in Different Courts.
24. Interpleaders.
25. Fixing Character of Record Party.

SECTION 15. Having, in the preceding chapter, tracing the general outlines of the subject in hand, had occasion to remark, as it were incidentally, that a complete or partial bar arising from a prior judgment must be between the same parties, standing in the same capacity, or else between their privies; or parties on the one side and privies on the other, as well as relate to the same matter in issue, the questions concerning *parties* now demand our more special attention.

SEC. 16. The preliminary inquiry herein is, who are parties in the contemplation of the rule? And we may remark here, in the first place, by way of answer, that these may, or may not, be the ostensible parties litigant, whose names stand on the record in the primary cause. The usual test laid down by Greenleaf¹ is doubtless as fair and full, and of as easy application, as any which could readily be devised, namely: Parties are all persons having a right to control the proceedings, to

¹ Evidence, Vol. 1, § 535.

make defense, to adduce and cross-examine witnesses, and to appeal from the decision if any appeal lies. And it has been held that these characteristics may sufficiently exist without making the party an actual party to the record; as, for example, where, in a second action, the record produced in evidence in behalf of the plaintiff did not show that the plaintiff's name was entered as a record party in the former suit, but the plaintiff testified that he was, nevertheless, an active participant in the former trial respecting the same subject matter, claiming the property in dispute as his own, appearing as a witness in the case, and in the absence of the record plaintiff (who claimed to hold only as the bailee of the present plaintiff) assuming control and direction of the case, and employing and paying attorneys to attend to it, it was held that such facts brought him very clearly within the definition of a party to the first action, notwithstanding the omission of his name on the record as a formal litigant.² And the court declared that the point was settled by abundant authorities. However, the mere employment of an attorney to defend does not bind one to abide the judgment rendered.³

SEC. 17. Hence, we see that a mere nominal party may represent a real one so as to exclude the latter effectually from bringing a second action upon the same matter. Thus, where a complainant's testator brought an action of assumpsit against a sheriff, who had collected money on execution and held it to be applied on an execution which had been assigned to the defendant in the subsequent suit, and the action of assumpsit abated by the testator's death, after which it was revived by the complainant, the issues tried, and judgment was rendered for the sheriff (the defendant), and afterward complainant brought a bill in equity to postpone the former judgment and the execution in question to the original judgment in favor of the testator, the court held that the matter was *res adjudicata*, and refused to entertain the bill. On appeal, the appellate court remarked: "The only question worthy to be consid-

² *Wood v. Ensel*, 63 Mo., 194.

³ *Stokes v. Morrow*, 54 Ga., 600.

ered is, whether this is a case between the same parties as those in the case of the *Executors of Tate v. Cobb, sheriff*, tried at law. Upon this point, as I have already intimated, I have a very decided opinion. The sheriff in that case was merely a nominal party, and the defendant in this case was the real party in interest. The sheriff was simply a stakeholder without a particle of interest. It mattered not to him which of the claimants recovered the money in his hands. The battle was fought over his shoulders by the real parties. Alexander Hunter (the present defendant) was not only the real party adverse in interest to the complainants (who were plaintiffs in that case) but he had notice of the suit, defended it by employing counsel, and paid them their fees and charges. He could not have testified for Cobb on the ground that he had an interest in the event of the suit; for the judgment of the court against the claim of the complainants would have given the fund directly to Hunter, there being no other claimant. If, under these circumstances, the verdict had been against Hunter, he could not have renewed the strife by another suit either against the complainants or the sheriff. If, in such an event, he had brought an action against the sheriff for the money which the complainants had recovered against that officer, would the judgment of the court not have been an estoppel? Could the sheriff not have held up that judgment for his protection and pleaded it in bar to the action? Could he not have said to Hunter, you were the real party defendant in the case; you had notice of the suit, and you defended it? The defense of the sheriff in the suit at law was not only for the benefit of the defendant, but was founded, and was successful, upon his rights and title. He was represented by Cobb in that suit; his declarations would have been admissible in evidence; and, in fact, his agreement with Tate *was received* as a part of the testimony against him. This could have been allowed upon no other principle than that of having been regarded by the court as substantially the real party defendant, or of there being such a privity between this defendant and Cobb as made them, in interest, the same party. If an agent, acting for his

principal within his powers, is sued by a stranger for the funds of his principal in his hands, and judgment is awarded against him by a court of competent jurisdiction, I apprehend that the principal cannot revive the litigation against the successful claimant in the same court, or in this court, except he comes here upon an equity not cognizable at law. If the property levied on by sheriff Cobb, under the Clark execution, had been recovered from him in an action of trover by a third party on the strength of his title, the plaintiff in that execution, or his assignee, would have been concluded by the verdict. He would not be entitled to be heard again in this court on the same grounds, or upon any grounds cognizable at law. The sheriff is the agent of the plaintiff in the execution, and continues to be invested with that character until he collects and pays over the money." As was said in the *Duchess of Kingston's Case*, "the court will take notice of the real parties to the suit,"⁴ notwithstanding the general rule that a suit between two persons shall not bind or affect a third person who could not intervene to make defense, examine witnesses, or take an appeal.⁵ And, in Pennsylvania, it has been held that where suits are brought nominally in the name of the president of the orphan's court, on a recognizance, the court will take notice if certain assignees are the actual plaintiffs.⁶ And wherever a principal knows of the pendency of a suit in which his agent is a direct actor, and acts in it, and is thereon recognized by the court as the real party, he will be held as fully bound as though he were the record party.⁷ And this is on the general principle that "it is not necessary to constitute a legal identity that each party on the record should be composed of the identical names and persons. It is enough that they are substantially the same. And this may often be the case when nominally they are different."⁸

⁴ *Ex'rs of Tate v. Hunter*, 3 Stroh. Eq., 139.

⁵ *Case v. Reeve*, 14 Johns., 81.

⁶ *Eshelman v. Adm'r*, 14 Pa. St., 564.

⁷ *Warfield v. Davis*, 14 B. Mon., 42.

⁸ *French v. Neal*, 24 Pick., 61, and cases cited.

SEC. 18. Yet it has been held that not one circumstance alone can determine the character of real parties who are not nominally made parties in the suit. The Supreme Court of Maryland, commenting on Mr. Greenleaf's description of parties, declares that such description is an aggregate, and that *all the enumerated qualities* must meet in order to constitute a party. Says the court: "All these privileges—not any one of them—are essential to the assertion and protection of private rights, and the investigation of the truth. Only, therefore, those who have enjoyed them collectively should be concluded by a decision, judgment, or decree."⁹

SEC. 19. But in a second suit, must all the parties be the same, or may there be more or fewer in one suit without vitiating the conclusiveness of the judgment rendered in the first action, when sought to be availed of subsequently? A case arose in Massachusetts upon an alleged breach of contract, in which the defendant offered to show that before the commencement of the action the plaintiffs had brought a bill for a specific performance of the same contract, against the defendant and one other, and that, in the proceedings on said bill, the whole subject-matter of the contract was presented and adjudicated, including the very breach complained of in the second suit, and that the bill was dismissed on the hearing with costs for the defendants. But the court refused to admit this as a bar to the action, and on appeal the decision was affirmed, and on the ground that "the suit in equity was between others, it could only be sustained by affecting with notice" the other party joined with defendant in the suit for specific performance. And otherwise a judgment for the defendants in that suit did not tend to negative the defendant's breach of contract on which the action at law was brought.¹⁰ But in Indiana, where there were different parties in two suits, the court held it immaterial as between two persons who were parties in both.¹¹ In New York, likewise, the same conclusion was reached in a case where the court remarked on this point:

⁹ *Cecil v. Cecil*, 19 Md., 80.

¹¹ *Davenport v. Barnett*, 51 Ind., 333.

¹⁰ *Buttrick v. Holden*, 8 Cush., 236.

"It was also contended that the parties in the two suits were different. But it will be remembered that the former suit was upon a promissory note which grew out of a transaction to which the plaintiff and defendant in this suit alone were parties, and that the plaintiff in this suit put in a separate plea, and notice of matter personal to himself; and the mere fact that another person was sued with him ought not to deprive the defendant in this suit of the benefit of the former judgment."¹² And Chancellor Walworth has declared expressly that it is no answer to the defense of a former recovery that the form of action in both suits is not the same, or that all the plaintiffs or defendants in both suits are not the same,"¹³ subject, however, to this qualification, that "where the form of the first action was such that the proof necessary to a recovery could only be brought forward in a different form of action, or where, from the number of plaintiffs or defendants in the first suit, the testimony relied on in the second is sufficient to authorize a recovery in such second action, but could not have produced a different result in the first, the failure of the plaintiffs in the one suit is no bar to their recovery in the other, although it is for the same cause of action for which they attempted to recover in the first suit." And the rule is held the same way by the United States Supreme Court in a well considered case, except that its application is restricted to cases where both the suits are not at law, but one in chancery, which, perhaps, is a usual restriction on the rule, though not recognized in the New York case just cited. The court say: "No good reason can be given why the parties in this case, who litigated the same question, should not be concluded by the decree because others having an interest in the question or subject-matter were admitted by the practice of a court of chancery to assist on both sides. The question, as between the present parties, is *res adjudicata*, and none the less binding because others are concluded also. A contrary doctrine would sacrifice a wholesome principle of law to a mere technical rule

¹²*Ehle v. Bingham*, 7 Barb., 497.

¹³*Miller v. Manice*, 6 Hill, 114.

having no foundation in reason, making a distinction where there is no difference. Such was the ruling of the court in the case of *Lawrence v. Hunt*, 10 Wendell, 82, where it was objected that in the former suit there was another plaintiff joined. Where the former suit was at law this objection might have some weight, for it could not well be said that a contract of A and B with D and C was the same as that in another suit where A was sole plaintiff and D sole defendant. But this objection cannot apply where the first issue is in chancery, and parties collaterally interested are made parties to the litigation that it may be final, and not because they were legal parties to the original contract on which the litigation is founded. In such a case, the pleadings may show the contract or subject-matter of the litigation to be the very same, and directly in issue; in the other it could not well be so.”¹⁴

SEC. 20. The relative position of the parties to the record in the two actions is not regarded as material. They may be respectively plaintiff and defendant, and defendant and plaintiff, without altering the result of the first litigation between them;¹⁵ because it is nevertheless an issue *between the parties*.

SEC. 21. It is not sufficient to satisfy the requirements of the rule of *res adjudicata* that the same *persons* are litigants in the two actions. For the same person may in law be considered as another person, and consequently another party, by suing in a different capacity. In a late case (1876) in England, this principle was involved thus: A passenger on the Great Northern Railway was killed by an accident, or rather so injured therein that he died in consequence. An action was brought, under the statute, against the company whose negligence was alleged to have caused the injury, by the widow as administratrix of her husband’s estate. One of the defenses was, that after the death the widow had sued the defendant company for the injury, in behalf of herself as the wife of the

¹⁴ *Thompson v. Roberts*, 24 How., 241.

¹⁵ *Barker v. Cleveland*, 19 Mich., 235.

deceased, and of her children, and had recovered damages. The replication, on the other hand, also set up the former suit as *res adjudicata* in respect to the facts relating to the accident, on the ground that in the previous action the company had pleaded not guilty, and the issues were found for the plaintiff. But the plea of *res adjudicata* was ruled out as to both parties on the ground that the plaintiff sued in the two actions in a different capacity: 1st as widow, and 2d as administratrix. In this case MELLOR, J., remarked: "I think this case is very well put by Mr. Bray; but we have come to the conclusion that it is a case in which an estoppel does not arise. It seems that, though nominally the machinery of the action in the one case is the same as the machinery in the other, yet the action in which the verdict has been recovered was an action of a very special and limited description. It was an action given expressly by the statute, and must be confined within the limits of the statute. It was to provide for what the law had not before provided for, namely, the right of an administrator or executor to sue for the benefit of the family in respect of the death of the deceased occasioned by the negligence of other persons; and the recital of the act is that no action at law is now maintainable against a person who, by his wrongful act, neglect or default may have caused the death of another person; and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him. It is, therefore, enacted that 'whенsoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof [it is limited entirely to this], then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.' Then, in the second section, it expressly enacts that 'every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall

be brought by and in the name of the executor or administrator of the person deceased.' Then the jury are to assess damages proportioned to the injury. By the later statute, 27 and 28 Vict., c. 95, the machinery is altered. There it is recited that persons may lose the benefit of the act, either from the expense of taking out probate, or because of the neglect of the executor; therefore the action is given directly to the person injured, but it is exactly in respect of the same matter and the same cause limited by Lord Campbell's act. This being the state of things, the executor being the mere machine, and this being the form of machinery provided by which an action can be maintained, the interest of the executor is in maintaining an action strictly within the limits of Lord Campbell's act, can an admission on the record, made where the right of the executor to bring the action is expressly so limited, be set up in another action brought by the executor generally in respect of the assets and estates of the deceased, so that in that action the defendants who have submitted in the former action are to be precluded from denying the facts alleged in the second action? I think that there is no estoppel under those circumstances; although the machinery is nominally the same, the entire object and effect of the action is totally different, and any admission made by the executor, if it were on his side or her side, would not be available in a subsequent action which was brought in respect of the general assets of the deceased. It is to be observed that the executrix, in a case under the act, does not sue in respect of anything which belonged to the deceased, but by force of the statute which enacts that the death of the deceased is to be made the subject of an action just as if he had lived. I think, therefore, * * * that the defendants were at liberty to traverse these allegations."

And QUAIN, J., remarked: "I am of the same opinion; I think the defendants are entitled to judgment upon the demur-
rer. * * * * * It is generally put in books that the plaintiff must be not only the same person, but he must be suing in the same right. I think that in these

two actions before us, although the administratrix nominally is the plaintiff, yet the administratrix is not suing in these two actions in the same right, but in very different rights altogether; and therefore, that the estoppel does not arise. The present action, which is now before us, is an action by an administratrix in the ordinary sense of that word representing the estate of the intestate, and in point of fact bringing an action for a loss to that estate. It is the ordinary action brought by an administrator or executor, either to increase the estate generally, or for some loss that the estate has suffered in consequence of some acts within the statute 4 Edward, 3 C., 7, which enables an executor to bring an action for damages to the personal estate. But when we come to look at the previous action, it seems to be an entirely different kind of thing. Lord Campbell's act enables an action to be brought in a case where it could not have been brought before that act, namely, when the man has suffered a personal injury and dies in consequence. After his death, before Lord Campbell's act, no such action could have been maintained, because the death destroyed it; it fell with the life of the individual injured. Now Lord Campbell's act gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. The act merely says that the nominal person to bring the action on behalf of certain relations (not on behalf of the next of kin or the creditors of the deceased, but on behalf of the beneficiaries, certain relations named in the act of parliament), shall be the executor or the administrator. It is plain, therefore, that an action brought by the person designated by the statute, is brought in an entirely different right from that in which the action is brought by the executors generally as representing the estate of the testator or the intestate. I therefore feel clear upon the point that these actions are not brought in the same right, and that the finding in the one does not constitute an estoppel in the other."¹⁶ And the principle herein enunciated is in full accord-

¹⁶ *Leggott v. R. R.* Law R. Q. B. Div., Vol. 1, 599.

ance with the leading cases on the point, and is distinctly declared in *The Duchess of Kingston's Case*.¹⁷

SEC. 22. A California case illustrates the same doctrine from another point of view. An infant sued, by her father as guardian, for injuries caused by a vicious animal belonging to the defendant, and recovered judgment. Afterward, the father sued in his own name for services rendered, and expenses incurred in healing the wounds received by the child, and the former recovery was pleaded as a bar. But the plea was held inadmissible, on the ground that both the parties and cause of action were different in the two actions.¹⁸

SEC. 23. The rule of parties is somewhat different in courts of law, and courts of equity and of admiralty. In the former only a party injured can sue in trespass, and if any one has an equitable claim therein, he must sue in the name of the injured party, whereas in the latter the person equitably entitled may bring an action in his own name.¹⁹ This circumstance may, in some instances, modify the application of the rule of *res adjudicata*, but I think not so as to make any noteworthy change in the principle.²⁰

SEC. 24. An interpleader is concluded by the result, as well as original parties. Thus, where, in an attachment suit, the maker of a note payable to the defendant was garnished, whereupon a third party interpled, and claimed the debt evidenced by the note as due to himself. On the issue thus raised judgment went against him, and he took no appeal. Afterward he withdrew the note, and sued the maker on it. *Held*, that the judgment on the interplea was a bar to the direct action.²¹ And so, where, in an attachment a third party interpled and claimed the attached property as his own, and the judgment was that the defendant was the owner, and afterward the interpleading claimant brought a direct suit

¹⁷ Smith's Leading Cases, Vol. II (6th American Ed.), 663.

¹⁸ *Karr v. Parks*, 44 Cal., 46.

¹⁹ *Propeller v. Mollison*, 17 How. (U. S.), 155.

²⁰ *White v. Mary Ann*, 6 Cal., 470.

²¹ *Richardson v. Jones*, 16 Mo., 177.

against the constable in possession of the goods under the attachment writ, the judgment as to the right of property on the issue raised by the interplea was held to bar the second action.²² But where the law raises no duty of intervening, one cannot be concluded by refusing or omitting to interplead in an action between others.²³ Although, where one interested as a subsequent incumbrancer is actually brought into court, he must then bestir himself as a party, or be concluded by his inaction. In a case of this kind the court said: "If there is anything in the principle that when a party is brought into court and given an opportunity to present his claims, he must do so at the peril of being cut off and foreclosed in respect to all such claims, the plaintiffs are clearly estopped from going back of this decree. They were subsequent incumbrancers upon the property in question. They were called upon to set up their claims, and assert their rights, and omitted to do so, and suffered the plaintiffs in that suit to take the said decree and proceed to execute the same. * * *

* * * It is suggested that the said judgment and decree is not conclusive, because the plaintiffs were made parties as judgment creditors. I do not think this position at all tenable. The plaintiffs were made parties as subsequent incumbrancers; it matters not what their liens were; they had an opportunity to set them up, and litigate the question in that suit. It is of no consequence that the plaintiffs made them thus parties as judgment creditors, and in ignorance of their chattel mortgage. The plaintiffs in this suit were not ignorant of the existence of their own mortgage, and they knew that the plaintiffs in that suit claimed a prior lien upon the property in question therein, and were seeking to enforce it against them and all subsequent incumbrancers, or to cut off all subsequent liens of whatever nature."²⁴ We will hereafter consider this matter in regard to leading parties.

SEC. 25. It is within the province of a judicial investiga-

²² *Richardson v. Watson*, 23 Mc 34. ²⁴ *Benjamin v. R. R.*, 49 Barb., 448.

²³ *Dorsey v. Smyth*, 28 Cal., 24.

tion to fix the character of a record party so that it shall be afterward conclusive—as for instance whether one is an original promisor on a promissory note, or an indorser merely.²⁵

²⁵ *Sturtevant v. Randall*, 53 Me., 151.

CHAPTER III.

APPLICATION OF THE RULE TO PRIVIES.

Section 26. Privies in Equity and at Law.

27. **Privy in Interest.**
28. **Privy in Estate.**
29. **Same Person Party and Privy.**
30. **Bail on Recognizance.**
31. **Execution Purchaser.**
32. **General Rule as to Privity of Estate.**

FOR the present passing by the subject of joint parties, and of representative parties, we will now consider the rule as applied to privies; especially so as both joint and representative parties may be regarded as partaking of a mixed character as both parties and privies.

SECTION 26. It will be remembered that a party is one who has a right to appear and control the litigation. A privy is one who claims under a party,¹ as to interest, estate or kindred. Thus, the purchaser of property involved in litigation, *pendente lite*, is a privy, who is bound by the result of the suit; and, such purchaser needs not be made a party in order to bind him. "Although the rule may sometimes operate to the prejudice of an innocent purchaser without actual notice, it is firmly adhered to; and it is based upon strong grounds of public policy and general equity; for, but for its adoption, the whole object of an expensive piece of litigation might be defeated by alienations made while it was pending, and there would be no end of controversies."² The question has arisen,

¹ *Bush v. Knox*, 2 Hun., 578.

² *Snowmen v. Henford*, 57 Me., 400.

however, as to whether the proceedings in equity in such a case may be made available in a subsequent action at law. This question, of necessity, has been answered in the affirmative as to cases wherein the decree has been carried into effect. In a matter of this kind the court remarked: "In these two cases equity ascertained, determined, affirmed and reaffirmed the plaintiff's right to the *locus in quo*. The deed required to be given to the defendant under the decree, had been executed and delivered prior to the commencement of the present suit. Equity had thus performed its office, exhausted its powers, and could do no more in respect to that controversy. With a title thus perfected, the plaintiff has a plain, adequate and complete remedy at law for any invasion of his property. The proceedings in equity are available at law to show that the deed given by the defendant to Saddler, prior to his deed to the plaintiff under the decree, is void and of no effect between the parties. There is neither reason nor law in invoking equity to enable a party to enforce his rights thus acquired, under an executed decree of a court of equity, as often as these rights should be invaded. It is the office of equity in such cases to settle the rights of the parties, and of law to provide the appropriate remedies to secure their enjoyment. Happily, each is competent for its allotted task and performs its office without infringing upon the prerogatives of the other."³

SEC. 27. Where a suit is brought in the name of one for the benefit of another who directs and advises the proceeding, the latter is a privy in interest, and will therefore be concluded by the judgment, even though not a party to the record. And thus, where one, whose goods were insured in the name of another who held them in store, agreed with the party insuring, after the goods were lost by fire, that the insurer should sue the insurance company for the use of the owner, and the agreement was carried out in good faith, but the action was defeated on the trial without any default on the part of the

³ Same parties, 62 Me., 436.

nominal plaintiff, it was held that the owner of the goods was a privy in interest, and was, therefore, concluded by the judgment, and could not re-litigate the issues in a suit against the insuring party (the former nominal plaintiff) alleging a breach of his contract to insure.⁴

SEC. 28. And so as to privies in estate, it is held that "a judgment which affects directly the estate and interest in land, and binds the rights of the parties, is at least as effectual as a release or confirmation by one party to the other, and makes part of the title to the land, and extends to all who claim under either of the parties to it."⁵

SEC. 29. And the doctrine of privity may also be applied to the same person suing in different capacities in two actions. Thus, where a judgment was rendered in favor of an indorsee against the maker of a negotiable promissory note made payable on demand, it was held to be conclusive upon the question of the indebtedness upon the note, to the amount of the judgment; and so afterward the maker could not in his capacity of administrator of the payee's estate, bring suit against the indorsee to recover the value thereof on the ground that he was a creditor of the payee, and that the transfer to the indorsee by the payee was fraudulent and void as against him as such creditor.⁶

SEC. 30. Bail on a recognizance is held to be a privy in law, and as such to be concluded by prior adjudication against a principal. This was declared in *Parkhurst v. Sumner*, although the declaration can hardly be called a decision, as the case was held not to lie within the compass of the rule.⁷

SEC. 31. And a purchaser under an execution is *sub modo* a privy. The Supreme Court of Mississippi thus says with regard to this matter: "It is said that the defendant here was not a party to the suit. But he claims title in virtue of it,

⁴ *Cole v. Favorite*, 69 Ill., 457.

⁵ *Adams v. Barnes*, 17 Mass., 367; *Kelley v. Donlin*, 70 Ill., 386.

⁶ *Flint v. Dodge*, 10 Allen, 128.

⁷ 23 Vt., 541.

and it is surely not necessary that a person who claims title to property under a judgment or execution against certain defendants should have been a party to the suit in order to enable him to show, in an action for the same property between those defendants and himself, the judgment or execution under which he claims, and by which their title has been adjudicated. The judgment is conclusive of the title of the parties against whom it is rendered, whenever the title has been the subject matter of the suit and has been adjudicated.”⁸

SEC. 32. The general rule of privity as to estate is thus defined: “Ordinarily, the decree of the court binds only the parties to it. But he who purchases during the pendency of the suit is bound by the decree that may be made against the persons from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, suits would be interminable, or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined.”⁹ And the principle extends to leases. And a purchaser, or lessee, under such circumstances, needs not have actual notice that the suit is pending. He is held by constructive notice in the absence of actual notice, in any event.¹⁰ And of course the principle extends to a sub-lessee.¹¹

⁸ *Shirley v. Fearne*, 33 Miss., 666.

⁹ *Commonw. v. Dieffenbach*, 3 Grant, 375, citing *Bishop of Winchester v. Paine*, 11 Ves., 197.

¹⁰ *National Bank v. Sprague*, 21 N. J. Eq., 535.

¹¹ *Miller v. White*, 80 Ill., 586.

CHAPTER IV.

AS TO JOINT PARTIES.

Section 33. Joint and Several Contracts—Plaintiff's Election.

34. Res Adjudicata as to Joint Obligations defined by Justice Story.
35. Rules governing Joint and Several Actions.
36. Obligations Joint but not Several.
37. Rules governing them.
38. Joint and Individual Obligations.
39. Exception as to Personal Defense.
40. Joinder severed by Death.
41. Absence from the Jurisdiction.
42. Merger of Joint Instrument in Judgment.
43. Waiver of Non-joinder.
44. Contribution as to Joint Sureties.
45. Individual Set-off in Joint Action.
46. Payment by one Joint Debtor.
47. Joint Trespassers.
48. Election of Plaintiff as to Several Judgments.
49. Joint Rule as to Joint Trespasses.
50. Release to one.
51. Criticism of Decision.

HEREIN we will first refer to joint parties in actions *ex contractu*, and then in actions *ex delicto*.

SECTION 33. In some cases the plaintiff has an election to treat a contract as joint or several, and in some states the law makes all joint obligations both joint and several. If the plaintiff makes it several by suing only one, a recovery without a satisfaction will not be a bar to a suit against the other, on the same cause of action; because the second action would

not be between the same parties, and the suit would be equivalent to bringing several actions on a merely similar instrument with another debtor; subject, however, to the just restriction that the plaintiff can have but one satisfaction of the claim.

SEC. 34. Justice STORY, in a very elaborate case, sums up the principles of *res adjudicata* as to joint obligations, and I avail myself of his summary *in extenso*. He says: "In *Sheehy v. Mandeville* (5 Cranch. R., 253), the Supreme Court of the United States held that a judgment rendered in a suit against one of the makers of a promissory note only (it being a partnership note) was not a bar to a joint suit against both the partners. But then the bar was not set up by the partner who was sued in the former suit, but by the other parner not sued, and as to the latter the court thought that as he was not a party to the former judgment it did not bind him, and would not operate as a merger in his favor. On the other hand, in *Ward v. Johnson* (13 Mass R., 148), the original suit was brought against one partner upon a partnership contract, and judgment obtained against him, and afterward assumpsit was brought against both partners, and each of them pleaded the former judgment in bar; and the court held it a good bar. It is observable that in *Sheehy v. Mandeville* the court did not rely upon the fact that the other partner did not join in the plea of the former judgment. In point of fact, he had been discharged as an insolvent debtor, and no further proceedings seem to have been had against him. In *Robertson v. Smith* (18 Johns. R., 489), the Supreme Court of New York held that a joint judgment against one or more partners, on a partnership contract, was a bar to another action against other partners not sued, and held the case of *Sheehy v. Mandeville* not to be sound law. In *Letchmere v. Fletcher* (1 Cromp. & Mees., 623), although the case turned upon some special considerations, the opinion was clearly indicated by Mr. Justice BAYLEY in delivering the opinion of the court, that unless a contract was both joint and several, a judgment

obtained against both would bar a suit on the same contract against either alone, and *e converso* a judgment against one of the joint contractors would be a bar of a subsequent trial against both. And he relied upon *Higgens' case* (6 Coke, 48), as fully bearing out these positions; as, by implication, it certainly does.

"It was in this state of the authorities that I was called upon to review and consider their force and bearing in the *United States v. Cushman* (2 Sumn. R. 426, 434 to 441). The conclusion at which I there arrived was that where the contract was both joint and several a judgment against both was no bar to a several action against each of them; and a several judgment against each was no bar to a joint judgment against both. The ground in both cases was the same; that as the parties had expressly made the contract several and joint, the merger of either in a judgment would not be a merger of the other. Since that decision, the question has arisen in England, and been directly decided by the court of Exchequer, in the case of *King v. Hoare*. There the contract was a joint simple contract; a judgment had been obtained against one of the co-contractors, and then another action was brought against the other co-contractor, and the question upon a demurrer was whether a judgment recovered against one of two joint contractors without alleging execution or satisfaction, was a bar to an action against the other; the court held that it was. Mr. Baron Parke, in delivering the opinion of the court, reviewed all the leading authorities, and pronounced what appears to me to be a very sound and satisfactory judgment. It proceeds directly upon the ground that when once judgment is given upon any demand, it passes in *rem judicatam*, and it cannot, upon the established principles of law, be sued for in another action. If the demand be founded upon a joint contract, it is certainly merged and barred in the judgment as to the first contractor sued, and if so merged and barred it would seem equally barred as to the other, since no joint suit can be maintained thereon, and it would seem to

follow that the contract being an entirety, and merged or extinguished by the judgment as to one, might be gone as to the other by operation of law. If the latter were sued alone, he might, even as a matter of pleading, insist that the contract was joint, and therefore both contractors ought to be joined. If sued jointly there could be no judgment obtained against the parties jointly because the contract as to one would be gone by the merger, and the suit must be good and maintainable as to all the defendants or not at all. On this occasion the learned Baron referred to the case of *Sheehy v. Mandeville* (6 Cranch., 253), and expressing a great respect for the judgment pronounced by Mr. Chief Justice MARSHALL, said he was not satisfied with the reasoning thereof. I must confess that for years I have entertained great doubts as to the propriety of the same decisions, and have thought the distinction taken as long ago as in *Higgens' Case* between joint contracts and joint and several contracts to be a sound one. If, however, the present case were precisely identical with that of *Sheehy v. Mandeville*, I should deem my judicial opinion bound by it, and should follow it without question. But there is this distinction between the two cases, that there the bar was not set up by the judgment debtor who was sued in the second suit; here he does set it up, and rely upon it; and the identity of the contract and demand in both is admitted by the parties. The United States sue for the same debt against both parties, assuming the debt to have been originally and equally due from them as a joint contract. Now, I confess myself to be unable to perceive how Trafton can be sued again upon a contract or debt which has passed in *rem judicata*; and if he cannot be sued again, the present suit is not maintainable, since, unless a joint judgment can be rendered thereon as upon a subsisting joint contract, the very foundation on which the suit rests is gone. It may be said that Bright was neither a party to the former suit nor a surety, and that the joint contract here sued on is not the same joint contract sued on in the former suit. In one sense that may be true; but

then as to Trafton it is precisely one and the same identical debt—and that debt is certainly merged in the judgment against him. If merged as to him, it seems (as has been already suggested) very difficult to see how it can remain against Bright. The case, *Ex parte Rowlandson* (3 P. Wm. R., 405), which seems to have been overlooked in all the cases before cited, contains a doctrine strongly corroborative of what has just been stated. Lord Chancellor Talbot there said: ‘At law, when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly, and, on the contrary, if he sues them jointly he cannot sue them severally; but the one may be pleaded in abatement of the other.’ My judgment upon the whole upon this point, is that the present case is not governed by the decision in *Sheehy v. Mandeville*, and, therefore, being at liberty to follow the dictates of my own opinion, I am prepared to hold the former judgment a bar to the present suit.”

SEC. 35. The rules then which may be laid down in accordance with the foregoing opinion, based on the English case cited therein, which is certainly founded on an incontrovertible reason, may be thus stated:

1. Where an instrument is joint and several, the plaintiff, at his election, may sue successively the various contractors singly, although he can only have one satisfaction.
2. One joint action will bar any subsequent joint action thereon.
3. A series of several actions, or even a several action against one of the contractors, will bar a subsequent joint action.
4. A joint action will bar any subsequent several action.
5. But suit must be brought either severally or jointly, as, if there are three obligors two of them cannot be sued together, and then the other severally.

SEC. 36. If, however, the obligation is joint only; and not joint and several, and suit is brought against one only, and

* *Trafton v. U. S.*, 3 Story C. C., 649.

trial is had therein, the irregularity being waived by a failure to plead the non-joinder in abatement, the plaintiff cannot afterward sue the omitted party, but must lose their security. And it is not necessary that the judgment be satisfied in order to exclude him; the rendition of the judgment is sufficient.² However, where, as in Illinois, all joint contracts are made joint and several by the operation of law, the ordinary incidents attending a contract which is joint and several by its terms will undoubtedly attach.

SEC. 37. On this matter the New York Court of Common Pleas remarks: "It is well settled that the recovery of a judgment against one of several joint debtors, though nothing is obtained upon it, is a bar to any future action thereafter, either against all the debtors or against any of them. (*Robertson v. Smith*, 18 Johns., 459; *King v. Hoar*, 12 M. & Welsb., 494.) It cannot be maintained against any number less than the whole; for, as the obligation is joint, an answer setting up the non-joinder of any one of the parties to the contract will abate the action. (*Ascue v. Hallingsworth*, Croke Eliz., 355, 494; *Cabel v. Vaughn*, 1 Wms. Saund., 291.) And it cannot be maintained against all, for a judgment having been previously recovered against one, he cannot, as long as it stands, be again charged in judgment for the same debt. (*Higgins' Case*, 6 Coke R., 541; *Lilly v. Hodges*, 8 Mod., 541.) If the action is brought against any number less than the whole, and no objection is taken by plea in abatement, the defendant will be deemed to have waived it, and the court will give judgment upon it as the obligation only of the party or parties sued. (*German v. Frederick* and *Dixon v. Bowman*, cited in note 4 to *Cabel v. Vaughn*, 1 Wms. Saund., 291; *Rees v. Abbott*, Comp., 832; *Lilly v. Hodges*, 1 Str., 533; 8 Mod., 166.) But if the contract or obligation be several as well as joint, as in a bond where the obligors bind themselves jointly and severally, the plaintiff has his election to sue all the parties jointly, or each of them separately. He may, in such a case, bring dis-

² *Peters v. Sandford*, 1 Denio., 225

tinct actions against each of them; and a judgment without satisfaction against one will be no bar to an action against another; but though he may maintain distinct actions against each, he cannot unite two in one action, or any number short of the whole; he must either sue them all together, or each of them separately. (*Streatfield v. Halliday*, 3 T. R., 782; 10 Year Book, 27 H. VIII, 6 Pl., 26; note to *Cabel v. Vaughn supra.*)³

SEC. 38. But suppose one of two joint debtors gives his individual obligation for the debt, and is sued on this separate instrument, will the judgment bar a subsequent joint action on the original evidence of indebtedness? The English case of *Drake v. Mitchell*, 3 East, 251, has expressly decided that there is no bar, upon the ground that the causes of action are different in the two suits. But this position has been forcibly, if not conclusively criticised in New York. The court say: "This case is not strictly analogous to that of a joint and several obligation in which all the parties to the contract bind themselves [or are bound by operation of law] both severally and jointly, but a case in which one of two joint debtors gives in addition his individual obligation for the debt; and, in support of the plaintiff's right, can the plaintiff, after recovering a judgment upon the individual obligation maintain an action against both debtors for the debt due by them jointly? I am referred to *Drake v. Mitchell*, 3 East, 251. The case is certainly in point. One of three parties who were jointly bound upon a covenant, gave his promissory note to the plaintiff in payment of his liability on the covenant, and the note not being paid at maturity the plaintiff recovered judgment against him. The plaintiff then sued all the parties to the covenant, and they pleaded the judgment against one of them in bar, but the plea was held bad. Lord Ellenborough declared that he understood the principle *transit in rem judicatam* to apply only to the cause of action on which the judgment was rendered, thus distinguishing the note as constituting a

³ *Benson v. Paine*, 2 Hilt., 556.

distinct and different cause of action from that on the covenant; and GROSE, J., said that not having been received in satisfaction, it could operate only as collateral security, that though judgment was recovered upon it it had not produced satisfaction in fact, and that the plaintiff, therefore, might still resort to his original remedy upon the covenant. I do not consider the reasoning of the court in this case satisfactory, or think that it is reconcilable with the principle recognized and acted upon afterward in the cases of *Robertson v. Smith* and *King v. Hoare*, before referred to. It is true that in those cases the judgment was recovered against one joint debtor, in an action upon the original contract, but, as will appear from the authorities already cited, the effect of bringing the action against him solely and of the absence of any plea of non-joinder, is treating it as his contract alone, and as such judgment is given upon it. The principle upon which the cases of *Robertson v. Smith* and *King v. Hoare* rest, is that after judgment against one, another action cannot be brought upon the joint contract, as the effect of it would be to render two judgments against the same party for the same debt, and such was the result in *Drake v. Mitchell* by giving judgment against all the parties to a covenant after judgment was rendered against one of them upon a note given for the debt due by the covenant. Such is the case here. The notes given by Barrett were for the debt for which he is now jointly sued with Paine, and if judgment is given for the plaintiff here, there will be two judgments against him for the same debt. It cannot be as Lord Ellenborough and the other judges in *Drake v. Mitchell* supposed, that actual satisfaction is the test, and that because the plaintiff has taken an individual obligation from one of the joint debtors, he can have two judgments in his favor for the same debt—one upon the joint and the other upon the individual obligation. If satisfaction were the test, and could alone constitute a bar, it would be a complete answer to the objection of the previous recovery of a judgment against one in an action against joint debtors, that

it had not, in the language of the court in *Drake v. Mitchell*, produced the fruit of a judgment—actual satisfaction. But it was deemed no answer in *Robertson v. Smith*, which settled the law in this State; and, the recovery of the judgment alone was held to be a bar, because it changed an indebtedness upon contract to a debt of record, and for the reason more fully given by Justice PARKE in *King v. Hoare*, that one of two joint contractors cannot be twice troubled for the same cause; that there could not be two separate judgments for the same debt; and that where judgment has been obtained for a debt the right given by the record merges the inferior remedy by action for the same debt. Nor do I think that the distinction taken by Lord Ellenborough that the covenant and the note constituted different causes of action was a substantial one. The judgment upon the note was for the same debt, and to render another judgment against the same party upon the covenant was contravening the principle referred to. The fact is, that the law upon this subject was not well understood, and had not been very distinctly defined when *Drake v. Mitchell* was decided. When the point came up for consideration in this State, in *Robertson v. Smith*, that a judgment against one joint debtor was an extinguishment of the right of action against the rest, there was a determination of the Supreme Court of the United States directly the other way (*Sheehy v. Mandeville*, 6 Cranch., 253), and yet that decision, supported as it was by the weighty authority of Chief Justice MARSHALL, was, after a full examination, deliberately disregarded, and when *King v. Hoare* was decided in England so late as 1844, the *dicta* of numerous judges were cited against the proposition contended for, and the point was found to be so unsettled and doubtful upon the authorities as to draw from Baron Parke, in delivering the judgment of the court, the observation that it was remarkable that the question had never been actually decided in England. If the law, then, was so obscure or unsettled upon this point, it may serve to explain why the judges in *Drake v. Mitchell* thought, in the case before them,

that nothing short of actual satisfaction would be a bar. Separate judgments might be had against the maker and indorser of a promissory note, and against each of the parties to an instrument where they had bound themselves severally as well as jointly; but though each judgment is for the same debt it is against a separate person, and does not present what Chief Justice SPENCER in *Robertson v. Smith* declared would be an anomaly in the law, and inconsistent with the notion of a correct and regular judicial proceeding—two judgments rendered against the same party for the same debt.”⁴

SEC. 39. An exception to the general principle that when a joint suit is brought the plaintiff must prove a joint contract, and take judgment against all or fail altogether, is in the case of a defense insisted on by one of the joint defendants, which is personal to him and does not go to the discharge of all; the plaintiff may enter a *nolle prosequi* as to him and proceed against the others—as, for instance, if infancy or a discharge in bankruptcy be pleaded;⁵ for such personal exemption in behalf of one should not be allowed to destroy the plaintiff’s just, legal remedy against the rest who have no personal claim to exemption.⁶ But this is also subject to a qualification, namely, that it is not at the plaintiff’s discretion to sever on the ground of infancy, etc., this being a personal privilege only. The New York Supreme Court asks whether it would not be unprecedented to allow a plaintiff to take advantage of the infancy of one of the parties to a contract for the express purpose of enforcing it against the others, and whether such a procedure would not be a direct violation of the principle that infancy is the personal privilege of the infant, and of which he only can avail himself.⁷

SEC. 40. The joinder of a contract is severed by the death of one of the joint debtors. And at common law the suit

⁴ *Benson v. Paine*, 2 Hilt., 557.

⁵ *Robertson v. Smith*, 18 Johns., 478.

⁶ *Hartness v. Thompson*, 5 Johns., 161.

⁷ *Ibid.* 162.

could be brought only against the survivor, the executor or administrator of the deceased not being held liable.⁸ But of late the rule is different in equity, wherein a proceeding at law against the survivor does not bar a proceeding against the estate of the deceased joint debtor. Says Mr. Story:
“The doctrine formerly held upon this subject seems to have been that the joint creditors had no claim whatsoever in equity against the estate of a deceased partner, except when the surviving partners were at the time, or subsequently became, insolvent or bankrupt. But this doctrine has since been overturned, and it is now held that in equity all partnership debts are to be deemed joint and several; and, consequently, the joint creditors have, in all cases, a right to proceed at law against the survivors, and an election also to proceed in equity against the estate of the deceased partner, whether the survivor be insolvent or bankrupt or not.”⁹

SEC. 41. Likewise, it has been held that the absence from the jurisdiction of some of the joint debtors will, from the necessity of the case,¹⁰ justify proceeding against those within the jurisdiction, so that the security of the absentees will not be lost, but a subsequent suit may be brought against them. In an early case (1809) the Supreme Judicial Court of Massachusetts declared that “It has been an immemorial practice, in the service of a writ sued on contract against two or more defendants, if some of the defendants are without the jurisdiction of the commonwealth, so that their bodies cannot be arrested, and having no usual place of abode within the state at which summons may be left, to cause the writ to be served on the defendants within the state, and to proceed only against them for the breach of the contract by all the defendants. The defendants upon whom the service is made plead that they with the others did not make the promise, if the action be an assumpsit; and so *mutatis mutandis*, if the action be debt; and if the plaintiff recover judgment, it is entered against the

⁸ 1 Chit. Pl., 50.

¹⁰ *Olcott v. Little*, 9 N. H., 261.

⁹ Story on Part., § 362.

defendants only who were served with process. From the frequency of the circumstance of joint debtors having been found to live in different states, this practice is exceedingly convenient, and no injustice is done, because if judgment had been recovered against all the debtors, the plaintiff might have satisfied it out of the defendants against whom it is in fact recovered. This practice originated from necessity, as no mode of service is provided by our laws upon a debtor without the state who has no place of abode nor property within it. It has also been extended to actions against executors or administrators living in different states, as the judgment is against the estate of the deceased."¹¹ And no doubt this same necessity originated the statutes that all joint contracts shall be construed to be joint and several.

SEC. 42. On a strictly joint and several bond, each obligor has bound himself to submit to either form of remedy; but it is equally true that he bound himself by but one instrument and for one debt, and whenever, by the pursuit of either remedy, the debt is carried into judgment, the instrument is necessarily extinguished or merged in the higher security, and is no longer capable of laying the foundation of another recovery,¹² that is, against the same party; as, if a joint action be brought, no separate action can afterwards be brought, and if a separate action be brought against one no joint action can be brought against two or more, although if a several action be brought against one, another may be brought against another. The principle of the rule is that two judgments, whether in the same form or in different forms, must not exist against the same party—a principle subverted however by the decision of Justice STORY in *United States v. Cushman*, 2 Sumn., 436,* to the effect that a joint action only bars another joint action, and not subsequent separate actions under which it is plain the same

¹¹ *Tappan v. Buren*, 5 Mass., 196; *Dennett v. Chick*, 2 Greenl., 192.

¹² *Bank v. Hart*, 5 Ohio St., 35.

* Afterwards retracted or overruled by him as we have seen.

party may have two judgments against him for the same thing — one joint the other several — which certainly cannot be a sound doctrine of law, notwithstanding the learned justice bravely maintained that the contrary is without authority either in law or in principle. Where separate judgments alone are obtained, the sum total only aggregates the equivalent of a joint judgment,¹³ and, conversely, a joint judgment contains the equivalent of all separate judgments on the obligation; and certainly either ought to exclude its equivalent in the same way that one judgment against a single debtor excludes another against him on the same liability.

SEC. 43. It is held that where a wife sues separately for a claim, in which suit the husband should be joined, but the non-joinder is waived, and the case proceeds to trial, she cannot, under an adverse judgment, re-litigate the matter anew by joining her husband. In a case of this kind the Supreme Court of Kentucky remarked: "Nor does the fact that the former suit was prosecuted in the name of the wife alone, without making her husband a party, prevent the judgment from operating as a bar in this action, in which she is the real party in interest. So long as it remains in force and unreversed, it forms a valid bar to any action in her name, and as her husband cannot maintain the action in his own name alone, it follows that it operates as a bar to the action in their joint names. As the wife carried on the former action in her own name, and it does not appear in any part of the proceedings in that case that she was a married woman, and as the other parties to the action made no objection to its prosecution in her name alone, and her husband acquiesced in it, the rule of law which makes the judgment of a court of competent jurisdiction, in a case between the same parties involving the same matters of controversy, a bar to another action — the object of the rule being to prevent litigation — forbids that she should be permitted in another action, brought jointly

¹³ *Harlan v. Berry*. 4 G. Greene (Ia.), 213.

by her and her husband, to re-litigate the same matters. It would violate both the object and the spirit of the rule.”¹⁴

SEC. 44. It is held that where one of several co-sureties or co-guarantors is sued for contribution, not having had notice of the prior suit against the others, that prior suit will not conclude him from showing that the plaintiff ought not to have recovered therein; and the Pennsylvania court remarks that, “If the rule were not so among co-sureties and guarantors, there would be great risk of collusion between creditors, and some of them to the prejudice of others, and that perfect good faith which should prevail among co-guarantors would be often sacrificed.”¹⁵

SEC. 45. The question has been raised whether an individual set-off of a former judgment can be available in a joint action. On this it has been held, 1. That where an action is in favor of joint plaintiffs, and afterwards the indebtedness of one plaintiff to a defendant alone is set up, there is a want of mutuality which would prevent the offset. 2. If the second action is against joint defendants, and the offset relied on is in favor of one defendant alone, there is the like want of mutuality. “To allow one defendant when jointly sued with another to bring into litigation in the same suit his individual private transactions with the plaintiff would be to multiply issues; and when the suit is determined between the plaintiff and defendants, to leave for another settlement or law suit the adjustment of accounts between the defendants growing out of the preceding suit; and so, when there are several plaintiffs and one defendant, the indebtedness of one of the plaintiffs to the defendant is not mutual, so far as the other plaintiffs are concerned.”¹⁶

SEC. 46. Payment by one joint debtor will operate as a satisfaction in behalf of all who are originally liable to the creditors. But mere payment by a stranger not bound to

¹⁴ *Hawkins v. Lambert*, 18 B. Mon., 106.

¹⁵ *Kramph's Ex. v. Hatz' Ex.*, 52 Pa. St., 529.

¹⁶ *Moody v. Willis*, 41 Miss., 357.

make payment will not bar an action subsequently against the real debtors—the act being considered merely volunteer on the part of the person paying without any joint or separate liability.¹⁷

SEC. 47. We now come to consider the rule in relation to *joint trespassers*, concerning whom the doctrine of several liability is carried to its utmost extent, although the law has been in a very unsettled condition until recently—even as late as 1865 the authorities being in conflict with each other, if not with themselves. Justice MILLER, in a case in the United States Supreme Court, has reviewed the English and American authorities very elaborately, and has deduced the doctrine that a judgment without satisfaction is no bar to a second action against co-trespassers not sued in the first; and stated two propositions as conceded by all the authorities, namely, “1. Persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may all be sued in one action, or one may be sued alone, and cannot plead the non-joinder of the others in abatement; and, so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages. 2. No matter how many judgments may be obtained for the same trespass, or what varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, and is a bar to any other action for the same cause.”¹⁸ The satisfaction must be an actual payment of the damages, and taking the body of a judgment debtor in execution is not held to be a satisfaction of the judgment.¹⁹

SEC. 48. But the question has arisen whether when a

¹⁷ *Mathews v. Lawrence*, 1 Denio, 213.

¹⁸ *Lovejoy v. Murray*, 3 Wall., 10.

¹⁹ *Sheldon v. Ribbe*, 3 Conn., 221, CHAPMAN, J., dissenting.

plaintiff sues one of several wrong-doers separately, and recovers judgment, which he elects to enforce, and which is satisfied in part, he is not concluded by the action to claim, in a subsequent suit against a different defendant, a greater sum for damages than was awarded him in the first action. And it has been decided affirmatively, and the rule is thus stated: "While the plaintiff may maintain separate actions, and may recover separate judgments against joint trespassers, and may elect to take the largest sum assessed, or to proceed against the solvent defendants, or in case no one of them is able, or can be compelled to pay the whole of the judgment rendered against him, may accept part satisfaction from one, and still look to the others for such balance as may be necessary to give him full legal compensation for the wrong suffered, yet, ordinarily, when he has made his election, he will be concluded by it. The collection of one judgment extinguished the entire claim for damages, and when, as in this case the injured party sues one of the wrong-doers and has his damages assessed, and then elects to enforce, and in fact does enforce his judgments until the estate of the defendant is wholly exhausted, he will not be allowed to say, in an action against another defendant, that the question as to amount of his damages is still an open one. It is true that his first judgment when rendered was but a security for his original cause of action, and until it was made productive in satisfaction thereof, it did not operate to change any other collateral concurrent remedy which he may have had. But when he voluntarily availed himself of the advantages secured to him by that judgment, and made it productive to the part satisfaction of the claim, then it did operate to modify these collateral concurrent remedies. His right of action against the other co-trespassers was not barred, nor his claim against them extinguished by his voluntary action in the premises; but when he determined to enforce the first judgment, and did make it productive, he elected to accept the amount assessed as damages as full compensation for the injury of which he complains, and to treat said judg-

ment and his other collateral concurrent remedies as securities for a claim, the amount of which had been rendered certain by judicial action. To this conclusion it may be objected that the wrong-doers who were not parties to the first action were not bound by the assessment of the value of the bonds converted [in the case then before the court]. This is true, but in such a case the plaintiff may, if he choose, decline to enforce his first judgment, and leave the question of the amount to which he is entitled an open one until he sues and recovers against all who are liable to him, and then elects which judgment he will enforce; or he may, as these appellants have done, sue upon his original cause of action, and compel the defendants to rely upon the first judgment and the election to enforce it, either by plea or as matter of evidence, and thereby secure a correlative advantage.²⁰

SEC. 49. The rules governing this matter may thus be summarized:

1. All joint trespasses are joint and several.
2. The defendants as well as the plaintiff may elect to sever, and in a joint action may plead separately, and have several verdicts returned.
3. Where several judgments are obtained, satisfaction of any one of them accepted by the plaintiff discharges all the rest, even if some have been rendered for larger amounts.
4. If the plaintiff proceeds to enforce the first judgment obtained, he will be held to the amount of damages therein assessed, although less than subsequent judgments are entered for.
5. But he may elect to wait until all the several judgments are obtained, and then choose which one he will enforce—with the like result as to amount.
6. He may collect a part from one, and then make out the balance of the amount of that judgment from the others.
7. The several judgments are regarded as collateral concurrent remedies to secure the one he elects to enforce, while the

²⁰ *United Soc. of Shakers v. Underwood*, 11 Bush. (Ky.), 272.

judgment he elects to enforce is a security for the original cause of action.

SEC. 50. A release to one of several co-trespassers is, of course, on like principle, a release to all, and will bar a suit as to others. On this the Massachusetts court remarks: "If it were not so, a party having a claim against several persons on account of a single tort might sue one and settle the suit, receiving damages; he might then sue another and settle in the same way; and repeat the proceedings as to all but one, and then sue and recover the whole damage as if nothing had been paid by the others. A door would thus be opened to a class of speculations that do not deserve encouragement. The rule of law which makes one satisfaction or release a bar to further claims for the same tort is founded in good reason."²¹ And in that state the principle has been carried so far as to apply to different trespassers not acting in voluntary concert; as where several creditors sued out writs against a debtor, and lodged them in the hands of the officer so that they were served at the same time, and the debtor wrongfully imprisoned thereon without any pre-concert on the part of the creditors. I doubt the principle of the case, and do not believe it would be generally followed as a precedent, as I think a joint liability essentially includes voluntary concurrence, and not merely a contemporaneous act. But it is ably argued in the opinion of the court, which I will here allow to speak for itself:

"There can be no doubt of the rule of law that co-trespassers are jointly as well as severally liable for the damages occasioned by their wrongful acts, and, as a consequence of this, that a release to one joint trespasser, or satisfaction from him for the injury, discharges all. This principle is applicable to the case at bar. In the opinion of the court, the several persons on whose writs and by whose order the plaintiff was committed to jail and held in confinement from June, 1858, to February, 1860, must be regarded in law as co-trespassers.

²¹ *Brown v. Cambridge*, 3 Allen, 476.

Evidence was offered at the trial to prove that he had received satisfaction from some of them for his alleged wrong, and had given to them in writing a discharge for the damages he had suffered by reason of his arrest and false imprisonment. This satisfaction and discharge in legal effect operate as a release of the present cause of action against the defendant.

"It cannot be denied that the parties who were plaintiffs in the original actions in suing out their writs against the present plaintiff and causing him to be arrested and imprisoned acted separately and independently of each other, and without any apparent concert among themselves. As a matter of first impression it might seem that the legal inference from this fact is that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers in the absence of proof of any intention to act together, or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff, for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he has been unlawfully arrested and imprisoned. This is the wrong which constitutes the *gist* of the action, and for which he is entitled to an indemnity. But it is only one wrong for which he can receive but one compensation. He has not in fact suffered nine separate arrests, or undergone nine separate terms of imprisonment.* The writs against him were all served simultaneously by the same officer, acting for all the creditors, and the confinement was enforced by the jailer on all the processes contemporaneously during the entire period of his imprisonment. The alleged trespasses on the person of the plaintiff were therefore simultaneous and contemporaneous acts,† committed on him by the same person, acting at the same time for each and all of the

*But is it not the same thing that there is a complicated nine-fold injury?

†Had they been willfully so, there would have been no room for controversy as to the joint trespass. But they were not.

plaintiffs in the nine writs upon which he was arrested and imprisoned. It is then the common case of a wrongful and unlawful act committed by a common agent, acting for several and distinct principals.

"It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers by whom the tortious act was done, were the agents of several different plaintiffs who, without pre-concert, had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of principals who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass committed by an agent can be multiplied by the number of principals who procured it to be done so as to entitle the party injured to a compensation graduated not according to the damages actually sustained, but by the number of persons through whose instrumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him and caused him to be arrested and imprisoned cannot be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such pre-concert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured. Whether the act was done by the procurement of one person or of many, and if of many whether they acted with a common purpose and design in which they all shared, or from separate and distinct motives, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, nor the damages increased which the party injured has a right to recover. He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with a privilege of electing to take his satisfaction *de melioribus damnis*. But

there is no rule of law by which he can claim to convert a joint into a several trespass, or to recover more than one satisfaction for his damages when it appears that he has suffered the consequences of a single tortious act only. Take an illustration: Suppose that several persons have a grudge or spite against the same individual, but that neither of them is aware of the existence of this feeling in the others, and that each of them, for the purpose of gratifying his malice, without concert or co-operation with any one, and in ignorance of a similar intent on the part of others, employs the same person — a hired pugilist or bully — to inflict on the common object of their ill-will a severe personal castigation. In such a case no one would doubt that all the persons who incited to the commission of the assault and battery would be regarded as co-trespassers. They each and all would be responsible for procuring the act to be done. They would be severally as well as jointly liable to an action in favor of the party injured; but no one would say that he could recover satisfaction from each of the persons liable to an action. When the damages suffered by him had been once paid by any one of those who procured the commission of the trespass, he could not claim to recover them again from each of the others. The law will not permit a party to receive anything more than a compensation for an injury. Where there has been only one wrongful act, there can be but one full and complete indemnity. When that is obtained, the party injured has exhausted his remedy.

“Another illustration, more analogous to the case at bar, will serve to show the soundness of this conclusion. If, instead of the arrest and imprisonment of which the plaintiff complains, the nine writs against him had been served simultaneously by the same officer by making an attachment of personal property belonging to him — his horse, for example; in such case it could not be doubted that if for any reason the attachments were irregular and void, the plaintiff would be entitled to recover, and to receive from one or all of the parties by whose order the attachments were made, the full

value of his horse. But it is equally true that he could not rightfully claim to receive this sum in damages from each of them, or nine times the value of the animal. And yet such would be the result if the attaching creditors are not to be regarded as co-trespassers. Nor is this the only absurd result which would follow from such a doctrine. If each attachment, or each arrest and imprisonment on the several writs, is to be deemed as a distinct trespass, for which the creditors are separately and not jointly liable in like manner as if made on one writ only, without any reference to those which were served simultaneously, we can see no reason why the officer might not be held liable to pay the plaintiff damages as many times as there were writs served by him. He certainly must be regarded as a joint trespasser with each creditor whose writ he served; and if the service of each writ constituted a distinct trespass for which the party injured might receive separate damages from each creditor, then the officer would also be subject to a like liability.

"These views have led us to the conclusion that the evidence offered at the trial by the defendant to show that the plaintiff had received full satisfaction for the arrest and false imprisonment to which he had been subjected, and for which he claimed damages in this action from some of his creditors, by whose order he was committed to jail, ought to have been admitted, and that the jury should thereupon have been instructed that the plaintiff could not maintain this action."²²

SEC. 51. With the utmost deference for the court whose able opinion I have cited in the preceding section, I must express my earnest conviction that the reasoning does not conclusively sustain the doctrine advanced therein, and that the decision cannot pass into precedent. To me at least, it is quite inconceivable that there can be a joint liability created without a joint act, or that there can be a joint act without any concurrence of will, or purpose, or any concert or voluntary combination of effort or movement tending designedly to

²² *Stone v. Dickinson*, 5 Allen, 30.

a common end. Surely, it must be so that in every *compound trespass*, so to speak, there must be as many trespasses as there are independent acts, and as many independent acts as there are independent actors.

Now take the case wherein the decision was rendered, and we find nine different persons acting independently in taking out writs and having them executed, without any union of purpose, or concert of plan or pursuit. The elements of simultaneous time, sameness of the agent, and accidental coalescing in the result are not sufficient, as I judge, to make the actions or the trespasses joint. The writs were sued out as separate writs, and were served as separate writs, notwithstanding the same agent executed them all *ex officio*. How several acts can become one by being contemporaneous in point of time, and by being performed in part through the same agent, I know not. In reality, the trespass was in suing out the writs unlawfully, which led, in the regular operation of the act, to the consequence of imprisonment. If the suing out of the writs was unlawful, the consequence was unlawful; otherwise, not.

Nor am I able to see anything incongruous in the supposition that a nine-fold exaggeration might result by taking out and executing nine different writs which deprived the plaintiff of his personal liberty for years. In this, the damages are, of necessity, exemplary, and not regulated by any standard of value such as there is in the case of an attachment of a horse, cited as an illustration by the court. And so I perceive no injustice in pursuing a remedy against each independent actor in the outrage. The long imprisonment endured by the plaintiff justifies the supposition that the combination of writs did proportionately exaggerate the trespass. The contemporaneousness thereof would, of course, make the estimation of damages difficult; but this difficulty could not make the accidental coalescing of results a joint trespass.

As to the officer, he would be protected by the process of the court, unless it were void on its face. But if he wilfully and knowingly received and executed void writs to oppress

the judgment debtor, I see no reason why he should not be made to pay just damages for each illegal writ he put into execution, and so be made to pay nine times as much for nine as he would for a single one.

CHAPTER V.

REPRESENTATIVE PARTIES.

Section 52. Privity by Representation not Constructive.

53. Administrator and Heirs.
54. Heirs and Executors.
55. Administrators and Distributees.
56. Scire facias against Heirs.
57. Heirs Bound by Decree for Specific Performance against Administrator, etc.
58. Administrator without Notice in Ejectment and the Heir.
59. Successive Administrators.
60. Their Privity as to Possession of Lands.
61. Judgment against Testator or Intestate.
62. Decree as to Distributive Shares of a Residuary Legatee.
63. Principal and Agent
64. Knowledge of Suit by Agent on the part of the Principal.
65. Agent's Authority.
66. Agent of Railroad Corporation.
67. Owner and Forwarder of Goods.
68. Defense of Fraud set up by Bailee as to Title of Claimant.
69. Insolvency and Bankruptcy.
70. Bankrupt no Party to Real Action brought against Assignee.
71. Creditor Debarred by Fraudulent Preference.
72. Official Character of a Receiver.
73. No Privity between an Officer and Plaintiff.
74. Master and Owner of a Vessel—Justice Story Criticised by an English Judge.

SECTION 52. The matter of representation will herein be considered as to individuals, leaving its application to municipal corporations for examination in a subsequent chapter. It is a

fundamental principle that a privity by representation must be an actual *de facto* relation, and not merely constructive. Thus the Maryland court, speaking of the relation of an administrator to the heirs as to an advancement to one of them, says: "No one in this state can claim a share or interest in the personal estate of an intestate except through an administrator. It is the administrator's duty to get in the personal estate of the deceased for distribution. Advancements, however, do not go into the inventory, and constitute no part of the assets for payment of debts, nor increase the fund on which the administrator's commission is allowed. It is optional with the party advanced whether he will come into hotchpot. The administrator has no interest in establishing the fact of advancement, and cannot be said to be a party in interest. It is wholly immaterial to him whether money or other property given by his intestate be brought into the settlement or not. The aggregate of the estate, so far as he is concerned, is neither increased or diminished. In the absence of all motive to protect the rights of the distributees, it would be hazardous to extend the priority of interest in law, where there is no common interest in fact, and conclude a party in interest by a constructive representation."¹

SEC. 53. An administrator does not sustain such a representative character to the heirs as to bind them by a mere settlement of the estate in a court of probate without making them formal parties to the proceedings,² which is not even *prima facie* evidence against the heirs. Even a judgment against an executor is no evidence against the heirs, either, as to the justice or the amount of a creditor's claim, it being regarded merely as *res inter alios acta*. And if some of the heirs acknowledge in writing the justice of a settlement made, it will not bind the others who did not join in the written acknowledgment. Nor indeed will the acknowledgment bind those who make it, according to the authority of the Virginia Court of Appeals, which says in such a case: "The

¹ *Cecil v. Cecil*, 19 Md., 81.

² *Robertson v. Wright*, 17 Gratt., 540.

account, in this case, was no evidence before the commissioner of the court of chancery except so far as the acknowledgment of the brothers made it so. But in that acknowledgment the sisters did not join, and it did not, therefore, bind them. Hence it could not avail the administrator, for he could have no decree for a sale of the realty without establishing his demand in such mode as would bind *all* the heirs. It is like the case of a confession of judgment by one of two joint obligors, and a successful defense of the action by the other, in which case the confession avails nothing, and judgment is entered for both defendants; the demand is entire, and if disproved as to one is disproved as to all, the confession to the contrary notwithstanding.”³

SEC. 54. However, on the other hand, a judgment against heirs can be pleaded against a subsequent suit brought by the administrator for their benefit.⁴ But where heirs disregard the claims of creditors, and of the administrator as such, and a judgment is rendered against them [or in their favor either, doubtless], the administrator is not thereby concluded. The reason of this is obvious; for so far is there from being any privity in such case that the administrator representing the heirs has a directly adverse interest.⁵ The Supreme Court of Iowa says that, “It would be carrying the doctrine far if the rights of the creditors are to be concluded by the heirs acting independently of them, and in their own right in any proceeding which they might institute in behalf of themselves, and to the exclusion of the administrator and the creditors of the estate.”⁶

SEC. 55. In Mississippi a case arose where, for twenty-eight years after the death of an intestate, there was no grant of letters of administration. Meanwhile the distributees had brought suit for some slaves. Letters were then issued and the administrator brought suit to recover the slaves, although

³ *Street's Heirs v. Street*, 11 Leigh., 508.

⁴ *Hardway v. Drummond*, 27 Ga., 223.

⁵ *Dorr v. Stockdale*, 19 Ia., 273.

there were no debts owing by the estate, or if there were they were barred by the statute of limitations. The court held he could not recover because he was plainly a direct trustee for them, and they would be the beneficiaries of a recovery as substantially as if they were formal parties to the action.⁶

SEC. 56. Under a statute in Pennsylvania, if a creditor obtain a judgment against the personal representatives of a decedent, the heirs may afterwards be brought in by *scire facias* in order to charge the real estate. And in such case the judgment is *prima facie* evidence of the debt, but the heirs are allowed to dispute it and set up any defense which they would have been allowed to make in the original suit if they had been parties to it. But the burden of proof is thrown on them by the *prima facie* evidence arising from the judgment, so that the plaintiff would not have to produce his evidence anew. "To have determined the point in any other way," says the court in a case of the kind, "would certainly have been a great surprise upon the profession in Pennsylvania, if not something worse. Ordinarily, one personal action is conclusive between the parties to it, and nothing but a just sense of the danger to parties interested, as heirs or devisees, in the real estate of a decedent, ever superinduced the relaxation of the rule in any degree. But to hold that a creditor who has, after a severe and prolonged contest, established his right to satisfaction out of the personal assets, but finds in the end that they are insufficient for the purpose, and that he must enter *de novo* into the same contest with the heirs—must anew produce his proofs and witnesses, perhaps scattered and lost sight of, under the expectation that they would never be needed again—is something in practice which has not been thought necessary for the last twenty years, at least."⁷ And in a later case the same court says: "The judgment against the administrator is conclusive as to the personal estate, but only *prima facie* as to the realty. Heirs and

⁶ *Manly v. Kidd*, 33 Miss., 148.

⁷ *Sergeant's Heirs v. Ewing*, 36 Pa. St., 160.

devisees have a right to a day in court before their interests can be affected by a judgment against the administrator, and they may question and disprove any and every item included in or constituting the judgment against the administrator, if they can; so that, in fact the only importance of the judgment against the administrator, so far as an interest in the realty is concerned, is, that it is *prima facie* evidence of a debt due by the estate, and the foundation of a proceeding to try whether or not the realty is chargeable with it.”⁸

SEC. 57. In Texas, however, the decision of an action against an executor or administrator for the specific performance of a contract made by the testator or intestate will bind the heirs, although they are not made parties to the proceeding.⁹ But this is in virtue of the statutes of the state. And so, in Georgia, a judgment regularly obtained against an executor by a creditor of the estate cannot be assailed, even in equity, by a legatee under the will, on the ground that a good legal defense existed which the executor failed to set up, unless they allege fraud, mistake, accident, or some complicity between the executor and the plaintiff; although such legatee may have a direct remedy against the executor for any negligence of the executor resulting in an injury to the interests of the legatee.¹⁰

SEC. 58. Where one was holding as a tenant, and the landlord died, and the tenant attorned to the administrator of the landlord’s estate and suffered eviction in an action of ejectment, the administrator having no notice thereof, and afterwards an heir of the original landlord obtained a patent junior to the one under which said tenant had been evicted, and brought an action to eject the successful plaintiff in the former suit, and the first judgment in ejectment was interposed as a bar, it was held that the administrator without notice was not concluded by the ejectment of the tenant; and he not being concluded, neither was the heir, the plaintiff in the second action.¹¹

⁸ *Steele v. Lineberger*, 59 Pa. St., 313. ¹⁰ *Cohen v. Broughton*, 54 Ga., 298.

⁹ *Shannon v. Taylor*, 16 Tex., 415. ¹¹ *Chant v. Reynolds*, 49 Cal., 216.

SEC. 59. As to successive administrators, the rule is that there is no privity between them, so that one may bind the other.¹² The commission of an administrator *de bonis non* gives him power to settle the unsettled business of the estate merely. And thus, in a suit against an administrator *de bonis non*, on a note purporting to have been executed by the intestate, an admission of the administrator-in-chief that the signature was genuine is not admissible against the succeeding administrator (the defendant), nor is the implied admission arising from judgments recovered against the first administrator on similar notes.¹³

SEC. 60. But in Vermont it has been held that as to the possession of lands a recovery by a former executor will inure to the benefit of a succeeding administrator, even as against the heirs, on the ground that the same matters which gave the former executor a right to recover the premises will give the same right to the present administrator, when no attempt is made to show a right acquired after the rendition of the judgment.¹⁴

SEC. 61. Of course, a judgment binding upon the intestate or testator in his lifetime is conclusive upon the administrator or executor after the death.¹⁵

SEC. 62. And where an executor files a bill against residuary legatees to determine their distributive shares, and therein the amount of an advancement to one legatee, and the amount of his distributive share is fixed by the decree, this decision is held conclusive upon these facts in a subsequent suit for partition of the real estate devised to the legatees by the will.¹⁶

SEC. 63. We now turn our attention to the relations existing between principal and agent with reference to the rule of *res adjudicata*. Herein a representative character exists, since "under the term parties to an action are included not only the

¹² *Thomas v. Sterns*, 33 Ala., 143; *Pernick v. McMurdo*, 5 Rand., 52.

¹³ *Rogers v. Grannis*, 20 Ala., 247.

¹⁴ *Payne's Admr. v. Payne*, 3 Wms. (Vt.), 175.

¹⁵ *Wilson's Succession*, 12 La. An., 592.

¹⁶ *Lorrey v. Pond*, 102 Mass., 357.

persons named and privies in law, but those persons whose rights have been legally represented by them.”¹⁷ In the case from which this quotation is made, the court defines the matter as between principal and agent or servant, thus: “When a former judgment upon the same matter should be admitted in another suit between the same parties, or between parties in interest not named in the record, such as servants or agents of the parties named, has been discussed by the elementary writers on evidence. This case requires that a single point only should be considered: whether one who acts as the servant of another, in doing an act alleged to be a trespass, is to be considered as so connected with his principal who commanded the act to be done that what will operate as a bar to the further prosecution of the principal will operate as such for his servant. If the action were brought against the servant, he could be permitted to prove that he acted as the servant of another who commanded the act, and was justified in the commission of it, or who, if the act were unlawful, had made compensation for it either before or after judgment, and his defense would be complete. It is not perceived why he may not, upon the same principles, be permitted to prove that the plaintiff had commenced a suit against his principal for the same cause of action, and proved the acts of his servant as material to the issue tried between them; and, that a judgment upon the merits had been rendered against him. In such case the principal and servant would be one in interest, and would be known by the plaintiff to be so. To permit a person to commence an action against the principal, and to prove the acts alleged to be trespasses to have been committed by his servant, acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant, and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule, that a judgment can only be admitted between the

¹⁷ *Emery v. Fowler*, 39 Me., 331.

parties to the record, or their privies, expands so far as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others." Hence, judgment without satisfaction is conclusive, and a judgment for or against a principal avails for or against an agent, and *vice versa*.

SEC. 64. But this is more especially the case if the principal knows of the pendency of a suit against the agent for property he holds for the principal, and acts in the matter, and is regarded by the court as the real party in interest. In such a case he is as much bound by the judgment against his agent as if he had been a formal defendant.¹⁸ But this is on the general principle previously explained, that the courts will look beyond the nominal party and treat him as the real party whose interests are involved in the controversy, and who conducts and controls the action or the defense, and will hold him to be bound by the judgment therein.¹⁹

SEC. 65. But it is not every kind of an action by an agent which will bind the principal by an adverse judgment. The matter must lie within the compass of the agent's authority, for it is a settled rule that a principal is not bound by the act of an agent outside the limits of an express or implied authority, and hence an unauthorized act of bringing suit will not bind the principal, except on the ground of either an express ratification, or an implied one fairly deducible from the fact of the principal's actual knowledge of the pendency of the suit by the agent. Thus, where a promissory note transferred by delivery was placed in the hands of an agent by the transferee with instructions to collect by suit if necessary, through an attorney at law, and which instructions were complied with on the default of the maker to pay the note, and the attorney in whose hands the note was placed, by mistake, sued on it in the name of the agent, and the action was successfully defended on the plea of a set-off against the payee, it was held that

¹⁸ *Warfield v. Davis*, 14 B. Mon., 41.

¹⁹ *Peterson v. Lathrop*, 34 Pa. St., 223.

the judgment was no bar to a subsequent action thereon by the principal who owned the note, he knowing nothing of the pendency of the suit.²⁰ In this case the court said: "The general principle is that judgments and verdicts are only binding on parties and privies. The plaintiff in this suit was neither a party nor privy to the former suit which is pleaded in bar. With the person in whose name the former suit was brought the plaintiff occupied no relationship, in reference to the property in the note, which would constitute privity. The only relationship which existed between them was that of a temporary agency on the part of the plaintiff in the former suit to demand payment of the note, and in default of payment to deliver it to an attorney for collection. It was decided in *Mayer v. Faulkrod* (4 Wash. C. C., 503), that where the suit was brought in the name of an improper plaintiff, and a recovery had and payment made, there being no collusion, the payment would constitute a defense to an action by the true owner of the cause of action. But that decision is put expressly upon the ground of a payment made by the legal and compulsory sentence of a competent tribunal; and it is admitted that in the absence of such payment the former judgment would be no defense. Besides, the correctness of that decision is doubted."

SEC. 66. And on the other hand, it has been held in Missouri that where the agent of a railroad company employed another person to dig a well and was sued for the price of the labor and prevailed in the action, the judgment thus rendered in favor of the agent in the first suit would not debar the workman from bringing another action against the company for the labor performed.²¹

SEC. 67. The privity between an owner and a forwarder of goods is sufficient, as it is held in New York, to bind the latter by a suit against a carrier brought by the former for goods lost. Although it is the settled principle that in case of loss either the general owner or the special bailee may bring an

²⁰ *Lawrence v. Ware*, 37 Ala., 555.

²¹ *Middleton v. R. R.*, 62 Mo., 581.

action against the carrier for negligence, yet, if the owner brings the action and there is a judgment against him on the merits, the bailee cannot afterward sue for the same negligence—the forwarder or bailee having no such interest in the property as would not be concluded by the judgment in the first action by the general owner.²²

SEC. 68. Where a bailor obtains goods by fraud and brings an action to recover them from the bailee to whom he has delivered them, the bailee may set up the title of the true owner against the bailor, and prove the fraudulent claim of the bailor. And when judgment is rendered therein, and the bailor, after his defeat, sues the true owner for the goods, the defendant in this action may avail himself of the former adjudication on the fraud and false title of the plaintiff.²³

SEC. 69. The subject of insolvency and bankruptcy properly falls within the compass of this chapter.

Where an assignee brought an action for the recovery of a debt due the insolvent estate, and, by his consent and the consent of the insolvent himself, the defendant set-off without pleading it a judgment obtained against the insolvent after the first publication of insolvency, and this judgment set-off being allowed, the assignee took a judgment for the balance of his claim, it was held that these proceedings barred a subsequent action by the defendant against the insolvent upon the judgment so set-off, even without any proof that the jury considered the judgment in making up their verdict; and that, too, even if the allowance of the set-off exceeded the assignee's authority to the possible injury of other creditors.²⁴

SEC. 70. In Illinois it has been held that where real estate in the hands of an assignee in bankruptcy becomes the subject of litigation, the bankrupt cannot be made a party to the proceedings, because he is, as it were, a dead man so far as property rights are concerned, these being vested in the assignee by the bankrupt act *proprio vigore*, so that the assignee must

²² *Green v. Clarke*, 2 Kernan, 343.

²³ *Bates v. Stanton*, 1 Duer (N. Y.), 88.

²⁴ *Sargent v. Fitzpatrick*, 4 Gray, 513.

be made a party by virtue of his absolute title as such assignee to the bankrupt's property, and as before said the bankrupt cannot be made a party because he is dead in law; and *per consequence*, the heirs or privies of the bankrupt are not concluded by any judgment rendered in proceedings wherein the bankrupt is made a party to the record, and the assignee is not.²⁵

SEC. 71. Where, prior to the bankruptcy, a fraudulent preference is given to a creditor who does not surrender his preference fully to the assignee, and the assignee brings suit under the bankrupt act to recover the property, and under an order of reference does recover it, the creditor is held to be so concluded as to be debarred from afterward proving his debt against the estate. In a case of the kind the court said: "The reference to ascertain the liens on the property and the fund, and marshal the fund, under the power given to the court by the first section of the act, was, to all intents and purposes, a litigation to which the bondholders were parties, if they consciously came in, either directly or through the mortgage trustees, asserting and maintaining against the resistance of the assignee their right to maintain their preference. Undoubtedly, even after the order of reference was made and the property was sold, they might have surrendered their preferences. But if they were parties to the litigation in the reference, they are bound by the order of November 1, 1873, and it is too late for them now to surrender their preferences, because the terms of that order make it *res adjudicata* between them and the assignee that the facts existed, as respects them, which gave the assignee the right to recover back the property and its proceeds, and that he has so recovered it back; so that it must follow that they must be debarred from being allowed to prove the debts in respect of which they accepted the preference. That order recites that the four creditors attended in person, or by counsel, upon the reference, that the register took all the evidence offered or introduced by them respect-

²⁵ *Harris v. Cornell*, 80 Ill., 64.

ively, as to the liens and incumbrances claimed by them respectively; that they appeared by their respective counsel upon the final hearing of the matter before the court, and waived in open court all objections to the form of the proceedings, and submitted all the questions involved to the decision and decree of the court, and were heard by counsel who are named. Then follows the judgment of the court. After this it is too late to go behind such final order on this question as to the provability of the debts, and inquire whether the evidence warranted such order, provided the four creditors were parties to the litigation so as to be bound by it.”²⁶

SEC. 72. Where a receiver, in his official capacity, obtains a judgment against a party and seeks to enforce it against property in the hands of others claimed to belong to the defendant, the holders of the property have indeed a right to enforce their claim of ownership, but the former judgment is so far conclusive upon them that they cannot dispute the official character of the receiver.²⁷

SEC. 73. There is no such privity by representation between an officer and a plaintiff as to allow a judgment for an illegal attachment, without satisfaction, rendered against the former, to bar a subsequent action against the latter for the same trespass. And, moreover, it has been held in Massachusetts that the fact that the plaintiff took part in the first action by paying counsel fees for defending the officer, and afterward made oath to a bill in equity which alleged that he had placed the attachment writ in the officer's hands for service in order to prevent the removal of the goods, and was liable to indemnify the officer, will not so far make the plaintiff a party that a second independent or separate action cannot be brought against him for the same trespass. And in such separate action these facts, though competent evidence against the defendant (plaintiff in the original attachment suit wherein the trespass occurred), will not be regarded as conclusive

²⁶ *Leland's Case*, 4 Benedict C. C., 165.

²⁷ *Peale v. Routh*, 13 La. An., 255.

against him.²⁸ Yet it was held in the same case that if the plaintiff had taken sole control of the action against the officer, after having directed the attachment suit and giving a bond of indemnity, the judgment against the officer would have been conclusive against him in the second suit brought separately against himself—all these acts taken together being held to be an assuming of the responsibility of the officer's acts;²⁹ and that, too, even where the officer had been directed to attach specific goods of the attachment debtor, but goes farther and attaches goods claimed by a third party, this claim being known to the attachment creditor.

SEC. 74. In England, it is held that where the master of a ship signs a bill of lading in his own name, and suit is brought thereon and judgment is rendered against him, a second action against the owner will not lie, though the judgment rendered against the master is not satisfied. In rendering judgment in such a case for the defendant, BRAMWELL, J., remarked: "We are of opinion our judgment should be for the defendant. If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made the contractee has an *election* to sue agent *or* principal supposes he can only sue one of them; that is to say, sue to judgment. For it may be that an action against one might be discontinued, and fresh proceedings be well taken against the other. Further, there is abundance of authority to show that where the situation of the principal is altered by dealings with the agent as principal, the former is no longer subject to an action. But this is the case here. The defendants may or may not be liable to indemnify the master in respect of his costs or his imprisonment. But they are clearly liable to him or his estate in respect of the damages recovered

²⁸ *Elliott v. Hayden*, 104 Mass., 180.

²⁹ *Knight v. Nelson*, 117 Mass., 459.

against him; and proceedings might have been taken against them as soon as judgment was recovered against the master, and before any payment by or execution against him. They are now, therefore, under a liability to the master or his estate to the extent of the whole claim; and yet it is sought to bring them under a fresh liability for that to the plaintiffs. If this, then, were the ordinary case we have mentioned, there could be no doubt on the subject. But it is said that the liability of the master of a vessel acting for his owners, and their liability where he acts for them, are different from the liabilities in ordinary cases of principal and agent, and that first one and then the other may be sued. The plaintiff's argument then, viz: that the present case is anomalous, is exceptional. When that is contended for, strong reason ought to be given for it. What is given here? It is certain that the master's liability is founded on the same considerations as that of an ordinary agent, viz: he makes the contract in his own name. *Rich v. Coe*, 2 Comp., 636; Story on Agency, § 296. But it is said that, for purposes of commerce, it is convenient both master and owner should be suable. So it is; but why to the extent contended for more than in any other case of principal and agent? It might be hard to make a person who deals with the master run after the owner to sue him; but why, if he sues the master, should he afterwards sue the owner merely because it is very right he should sue the captain or owner? In reality, no reason can be given for the distinction attempted between this and other cases of principal and agent; it is not said none could be given why in *all* cases of principal and agent both should be suable, but that there is no particular reason applicable to the captains and masters of ships.

"The case, then, must rest not on principle but on authority, and that authority is limited to a passage in Story on Agency. It is remarkable that he is of opinion that there was by the Roman law an option to sue either, but not both. If so, what he lays down is peculiar to 'our law,' and doubly anomalous.

He gives no reason for it, but cites Livermore on Agency. He (Story) says the second action may be maintained, unless 'in the first action he has obtained complete satisfaction of his claim.' On reference, however, to Livermore—we say it with great respect—he really says nothing in support of such a proposition. What he says is, 'masters of merchant vessels are personally answerable upon the contracts made by them in relation to the employment of the ship, to repairs, or to supplies furnished for the ship's use; for the law gives to the merchant who contracts with the master a two fold remedy against the owner and against the master.' For this he cites *Rich v. Coe*, 636, which, though a very questionable decision, justifies Livermore's propositions, but not Story's. It only decides that the owners are liable upon an order by the master for necessaries, though without their authority. It is true Lord Mansfield says the master, the owner, and the ship are trusted, but he says nothing to support what is contended for. It is remarkable Story does not cite this authority, so cited by Livermore. *Melius est petere fontes quam sectari rivulos.*

"Then, really, there is no authority for this contention, while there is much the other way in the silence of all other writers on the subject. It is not suggested in Abbott on Shipping, p. 91, nor in Kent's Commentaries (see 3 Kent, 181), nor in Mande & Pollock on Shipping, p. 102, nor in Maclachan, p. 128, nor in Parsons on Maritime Law, Vol. 1, p. 378. There is one powerful consideration the other way, viz: if the master contracts under seal, no action lies on the contract against the owner. Why? If the master makes two contracts, one for himself and one for his owners, why should *his* contract being under seal prevent the owners being sued on that which the master has made for them? Nothing. But if he makes one contract only, as in ordinary cases where the agent contracts in his own name, which the merchant may say binds him because made in his name *or* binds his owners because made *for* them, then the decisions are intelligible, and the expression is correct, the owners are not liable because of

a technical rule that a contract under seal cannot bind a person not executing and not giving authority under seal for its making."³⁰

The subject of officers and deputies we reserve for examination in connection with parties answerable over.

³⁰*Priestley v. Fernie*, 3 Hurl. & C., 983.

CHAPTER VI.

LANDLORD AND TENANT.

Section 75. Whether a Landlord Concluded by Suit against the Tenant.

76. General Rule as between Landlord and Tenant.

SECTION 75. There is a similarity in some respects between the topic of this chapter and that of the last, but not a complete identity, so that the former may well be considered immediately after the latter in logical order, but separately. The particular distinction is that as the landlord does not hold under the tenant he is not held to suffer by reason of the default or weakness of the latter, while, on the other hand, as the tenant does hold under the landlord as a privy in estate, he will be concluded by his landlord's acts prior to the lease, and by a recovery against his landlord on grounds equivalent to such prior acts. And, in South Carolina it has been held, on this general principle, that even where the tenant is assisted, on a trial of trespass to try title, by the landlord, yet the latter will not be bound unless a party to the record, on the ground that unless he is such party it cannot appear from the recovery against the tenant that the landlord had the full opportunity for defense he would have had if he had been made a formal party to the record. And, further, that even if it could be shown by extrinsic evidence that the landlord's efforts were not obstructed, and that he had exercised the privileges of presenting his title, producing evidence, and cross-examining witnesses, yet he would not be concluded, because his being a formal party might have caused change in the jury, or in the evidence admissible, or in the conduct of

parties or counsel, which might have promoted a different result.¹ But this seems, in reality, a departure from the general principle that a real party in interest who exercises the rights of a party, or is virtually represented by the party to the record, is concluded by the result. And the doctrine is usually the other way, I think, and in accordance with the general rule. Thus, in California, it is held that in an action of ejectment against a tenant, the landlord is concluded by the judgment as fully as if he were a formal party, provided he has put his title in issue, and assumed the defense, under notice by the tenant, and with the tenant's permission,² though not otherwise.³ The court say: "A possible future controversy between the landlord and tenant was not the only or the principal purpose in view in securing to the landlord the right to defend the action in the tenant's name, but it was that the issue between the plaintiff's and the landlord's title might be litigated and determined. If the judgment when for the plaintiff would not bind the landlord, he could not avail himself of its benefits when it was for the tenant. It is impossible to conceive that the courts should concede to a person the right to participate in an action without his being bound or benefited by its results." Moreover, in that State it is held that when once the landlord, on notice, is admitted to defend, this gives him the absolute subsequent control of the cause, and the tenant cannot interfere with any subsequent proceedings, to the landlord's prejudice. And the right of control extends to the final disposition of a cause in the appellate court. And where a tenant, in whose name a landlord appealed a cause, executed a release of errors in the Supreme Court, on which the plaintiff moved the dismissal of the appeal, the court refused to dismiss—although there had been no order entered of record in the court below allowing the landlord to appear and defend, but he had in fact conducted the defense at the request of the tenant—it being held too late

¹ *Samuel v. Dinkins*, 12 Rich., 174.

² *Valentine v. Mahoney*, 37 Cal., 394.

³ *Chant v. Reynolds*, 49 Cal., 216.

to object in the appellate court for the want of such an order.⁴ The cause was reversed. And thus, that a judgment may be conclusive, it must appear that a third party bore such a relation to the title as to make it his duty to appear and defend on notice, and that an opportunity was afforded him of doing so.⁵ If the tenant has, designedly or otherwise, suffered a default, the landlord may, in that State, have the default set aside on a proper showing; but all the proceedings, it seems, must be in the name of the tenant, and not in his own name.⁶

SEC. 76. The general rule, then, deducible from the authorities is, that the tenant is bound by the landlord's prior acts, and probably by the landlord's subsequent loss of title on grounds pre-existing the lease, while the landlord is bound by proceedings against his tenant only so far as he has notice thereof and is admitted to defend therein. And, as between themselves, it is a universal principle that a tenant is not allowed to dispute his landlord's title without first surrendering the possession of the land to him.

⁴ *Dutton v. Warschaner*, 21 Cal., 620.

⁵ *Calderwood v. Brooks*, 28 Cal., 156

⁶ *Dimick v. Deringer*, 32 Cal., 491.

CHAPTER VII.

PARTIES ANSWERABLE OVER; OR, RESPONDEAT SUPERIOR.

Section 77. Statement as to Subject.

78. How far Privity Extends.
79. Judgment must be Satisfied—Ca. sa. no Satisfaction.
80. Dissent from this.
81. Chief Justice Kent on Joint and Several Judgments in Torts, and on Satisfaction.
82. Official Responsibility as between a Sheriff and Deputy.
83. Relation between Sheriff and Deputy Defined.
84. Same—Whether Judgment against Deputy will Bar Action against the Sheriff—Joint and Several Actions against them.
85. Plaintiff as Joint Trespasser with Deputy, and with Principal Officer.
86. Amount Conclusive in Suit against Deputy by Sheriff.

SECTION 77. In strict language, our inquiry herein will be confined to official deputies, although, in a measure, sureties—private and official— are in part included in the title of the chapter. There is, however, a distinction which renders it more expedient, I think, to consider the matter of suretyship all together, in a distinct chapter.

SEC. 78. The general rule is that a judgment against one is evidence against the other, but yet that there is no such privity as to prevent fraud or collusion from being pleaded against the first judgment, particularly in the matter of suretyship. A sheriff being responsible for the official acts of his deputy, a judgment against the deputy is evidence in a subsequent suit against the sheriff on the same issue. And

so a judgment in favor of the deputy inures to the benefit of the sheriff; as, for example, where a deputy was sued for seizing some personal property, and on trial the plaintiff was defeated on the issue of right of property, it was held he could not try the right in another suit against the principal officer, merely on the ground that the latter was responsible, and he had a right of action against him also.¹

Sec. 79. But a judgment without satisfaction for damages, rendered against the deputy, will not prevent a judgment afterwards against the principal; and, taking the body in execution is not regarded as such satisfaction. In a case of this kind, in Connecticut, the court said: "It is unquestionably clear that the plaintiff might have instituted a suit either against the sheriff or his deputy for the default complained of, and that nothing short of satisfaction made by one would annihilate the remedy against the other. Although the causes of action are not precisely identical, yet the sheriff is subjected equally with his deputy to a responsibility for his official neglect or misconduct. The relation between them, in point of effect, produces the same consequences as that between joint and several promisees or joint trespassers; the judgment against one does not extinguish the right of action against the rest, but this consequence merely results from satisfaction made to the creditor. (*Sheldon v. Kibbe*, 3 Conn., 214.) The taking out execution and levying it on the body of Bissell was no satisfaction of plaintiff's demand, but merely a gage for his debt, or a security for the original cause of action until it should become productive. (*Bloomfield's Case*, 5 Co. R., 87; *Drake v. Mitchell*, 3 East., 251, 258; *Macdonald v. Bevington*, 4 T. R., 827; *Sheehey v. Mandeville*, 6 Cranch, 265.) The principle of *transit in rem judicatam* has relation only to the positive cause of action on which judgment is rendered, and operates as a change of remedy;* but

¹ *King v. Chase*, 15 N. H., 19.

* This, as a general principle, cannot be maintained, I think, on authority or on principle; for the rule bears directly on the issues of a case — that is, substance as well as remedy.

it is still merely a security, and effectuates no extinguishment of any collateral, concurrent remedy which the party may have. Notwithstanding the imprisonment of Bissell until payment or a discharge of the execution, the cause of action against the sheriff exists unimpaired, and his liability to suit is the same as if no action had been instituted."²

SEC. 80. But in the case just cited Justice CHIPMAN dissented vigorously, and maintained, with much ability, the position that the mere rendition of a judgment will bar a suit against one liable for the same trespass. He says: "It will be granted me in the outset that the principle adopted by my brethren in this case is not necessary to the attainment of justice in any supposed case; since it is in the power of the plaintiff in any action founded on tort to include every person liable in a single action, or as many of them as he pleases. To allow him to sue each separately is to give him no advantage, unless it be advantageous to him to have the power of indulging his corrupt passions in vexing and harassing those who are in his power; a disposition to do which is too often seen in our courts of justice. Were the principle adopted by the court applicable to actions of trespass only, it would be more tolerable; but, when it is seen that the principle is equally applicable to ejectment, trover, malicious prosecution, as well as every other action founded in tort (for they are all in the same sense joint and several), it must be acknowledged that the decision of this case is of the last importance, for it settles a principle which puts it in the power of those who choose to use it of multiplying law suits to almost any extent, to the great injury of individuals as well as of the community. In many cases founded on torts the only question is the right of property, no personal blame being imputed to the defendant; and, in many cases, the plaintiff is at liberty to sue in tort or contract, at his election. Surely the public good does not require that there should be as many actions as there are parties. An officer in attaching property would often lay

² *Morgan v. Chester*, 4 Conn., 388.

a foundation for a whole docket of causes; first, against himself; second, against all the creditors under whose direction he acted; and last, against all his assistants separately. If the levy should be a mistaken one, each must pay a bill of costs, and one the damages; and, what perhaps is worse, the court might be employed a long time in trying the same cause against the different defendants with different juries (for there must be a new jury for the trial of every cause), and, what is worst of all, the plaintiff will have it in his power by this experiment to ascertain which jury will give him the highest damages. That such a principle as this should exist in any code of laws, in any country, seems to me incredible." He proceeds to deny that such is the common law of England, as is generally claimed, and on this reviews the English cases supposed to support the affirmative of the proposition, and utters the bold challenge:

"Let us see whether any of the cases relied on by the plaintiff even *conduce* to prove that where a judgment has been recovered against one joint trespasser, and execution has been taken out and levied on his body, a trial has ever been had against his co-trespasser." He pertinently asks: "If the analogy between actions founded on torts, and those on joint and several contracts, were complete, why might not *two* be sued on a joint and several note given by three? Two joint trespassers may be sued where three are liable." He also cites and controverts *Livingston v. Bishop*, which will be noticed in the next section *infra*. However, HOSMER, J., speaking for the majority of the court, says: "The supposed inconvenience probably resulting from there being several judgments in distinct actions is imaginary. It will be no greater than has the sanction of established principle in the case of joint and several contracts, and the satisfaction of one judgment will be followed by the same relief against all." Again: "The same person cannot be again sued on the contract, for *nemo debet bis vexari*; but the judgment does not extinguish the cause of action, and has no effect on the collateral remedy against the other contractors. That a judgment against one of sev-

eral joint trespassers is precisely parallel, strikes me with a force I cannot resist. In both cases the suit is founded on an entire indivisible cause of action, that is, on a contract and tort incapable of separation or division, and in both instances the remedy is joint and several. In the one case the legal operation is founded on the act of trespass merely, an act of the body; and, in the other upon the contract of the parties, which is an act of the mind. The steps preceding the result are different, but the result, the jointness and severalty of the remedy, is the same in both instances. The unity and indivisibility of the cause of action in both cases is perfectly alike. If a trespass is committed by A and B on the body of another, the acts are distinct; the stroke of A *in fact* not being the stroke of B, and *vice versa*. But, by operation of law, these distinct acts are amalgamated, and in all their parts become the united act of both. So a contract, made by A and B, and subscribed by each, is created by distinct acts, the assent and signing by one not being the assent and signing by the other, but by legal result it is the inseparable act of both. The united mind with which the contract was made gives it unity, and the same unity proceeds from the united mind of joint trespassers. In both instances, the cause of action is one and indivisible, and the remedy is joint and several at the option of the plaintiff. Between the legal effect of a judgment in cases of such intimate resemblance, why should there be a difference?"

SEC. 81. In the case of *Livingston v. Bishop*, cited by CHIPMAN, J., in his dissenting opinion, *supra*, for the purpose of criticism,³ Chief Justice KENT, in delivering the opinion of the court, said: "On looking into the books with a view to this question I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcileable with reason. It is, however, a proposition that is not controverted, but everywhere admit-

³ 1 Johns., 290.

ted, that for a joint trespass [or where one is answerable over for the acts of another, except perhaps *officially*, as noticed below] the plaintiff may sue all the joint trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits; for the cause that happens to be first tried may be used by way of plea *puis darrein continuance* to defeat the other actions that are in arrear. The more rational rule appears to be that where you elect to bring separate actions for a joint trespass, you may have separate recoveries and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made this election he is concluded by it, and that if he should afterward proceed against the other defendants, they should be relieved on payment of their costs."

SEC. 82. The distinction between the relation of a sheriff and his deputy and that of joint trespassers is not such as would prevent the application of the rule, although I have judged it to be such as in logical order to require separate treatment in the discussion thereof. It is this: In joint trespasses there must be a concurrence of will, so that the act of one may be justly attributed to the others as their act also, because of their consent to it. But an officer is liable for the acts of his deputy to which he has given no consent, and of which he has no knowledge—a liability arising from the relation officially subsisting between them. And herein is a distinction also from the relation of principal and agent originating liability, since the liability of a principal arises from the authority given the agent, or from subsequent ratification of his acts. The responsibility of a principal for the acts of his agent only arises when the agent's wrong doing is within the scope of his employment as such agent. The authority of

a deputy, however, is simply to do such official acts as the law attaches to the office of the principal as official duties; and yet, if, within the scope of official conduct on the part of the deputy a trespass is committed, the officer is answerable over in default of the deputy in making satisfaction.* But the incidents of joint and several trespasses are attached to this, as we have seen, in that one may be sued and then the other for the same act. Yet they probably cannot be sued together or jointly, but only severally upon the same cause of action, they sustaining only a *quasi* joint liability between them, since *satisfaction* by one will bar as to the other.

SEC. 83. Thus the Massachusetts court, in an early case, said, holding, however, that several actions even could not be brought against one and then the other, as I think in opposition to the general rule: "The sheriff is considered by the law as a trespasser, for the act done by his deputy rather by fiction of law, for the better security of the party than from analogy to the principles which constitute joint trespassers generally. He neither does the act himself, nor is present aiding and abetting, nor is it done by his express command. The deputy is to be considered as acting under the command of the law as much as the sheriff would be if the act was done by him. He acts upon each particular precept independently of his master's orders; and he cannot, while he remains in office, be prevented by the sheriff from executing any precept which comes lawfully into his hands. The relation of sheriff and deputy is not in all respects like that of master and servant; as, for instance, a master cannot be sued in trespass for any act willfully done without authority from him, by the servant, though he is answerable in case for the damages occasioned by the negligent, careless or unskillful conduct of the servant in any matter coming within his duty as a servant. * * * * * The liability, therefore, of the sheriff arises from the peculiar relation which exists between him and his deputy, and is imposed by law in order

* And the deputy to him on his paying damages for the trespass or non-feasance.

that he, being always a responsible person, may stand as a substitute for the deputy when any wrongful act is done. It has even been questioned whether any action will lie against the deputy for any official misdemeanor of his own, and it was only because the deputy was, in some sort, according to our statutes, an independent officer that an action was held to lie;* as, in the case of *Draper v. Arnold*, 12 Mass., 449, where it was intimated by the court that the plaintiff had his election to sue the sheriff or his deputy. That they have not been considered co-trespassers may be inferred from the circumstance that no action has been brought against the two together within the knowledge of any of the court. There are inconveniences contended for by the plaintiff's counsel which would make us regret that it has been established as law. The plaintiff having elected to sue the deputy, leaves the sheriff without any right to pursue his remedy upon the bond as long as the process may remain in court, and perhaps ignorant of the cause of the action pending; he will therefore see no occasion to call on the sureties, and in the meantime the circumstances may be so changed that he may lose his indemnity; or if the sureties remain good *they* will be likely to suffer by the delay, as they will have no cause of action against the deputy until they are called upon by suit."

SEC. 84. But the court held that judgment and execution, even without satisfaction, will bar a subsequent action against the sheriff—wherein I think the general rule is the other way, as maintained in the dissenting opinion of WILDE, J. The majority of the court decided that "It is sufficient for a party suffering by the act of a minister of the law that he has the option of suing the officer who did the act and the creditor who commanded it, in cases of attachment or levy upon goods, and also may elect to bring the action immediately against the superior officer who is held constructively to have done the act himself, instead of the deputy. If he choose to sue the deputy, and proceeds to judgment against him, and sues out his

* I think, however, an action will always lie against the trespassing deputy by reason of his *voluntary agency* in the act complained of.

execution, there can be no good reason for allowing him afterward to resort to the sheriff at the hazard of the consequences which have been suggested." WILDE, J., dissenting, said: "It is agreed by all that on the facts in the case an action may be maintained against either the sheriff or the deputy, at the election of the plaintiff. Against the latter because the injury complained of was his voluntary act, and against the former because the act was in contemplation of law authorized and commanded to be done by him.* Whatever is done by the deputy, by color of his office, is presumed to be authorized by the sheriff, and on this ground alone can an action of trespass be maintained against him without proof of an express assent on his part to the act done or a subsequent recognition of it. (*Ackworth v. Kempe*, 1 Doug., 40.) It seems to me equally clear that whenever a trespass is committed by a deputy by color of his office, the party injured may have a separate action against the sheriff and another against the deputy, and may proceed to judgment in either. The pendency of an action against the deputy could not be pleaded in abatement in an action against the sheriff. If this be true, I cannot imagine what objection could be made to a joint action against both, or how such a case is to be distinguished from the general principle that where one commits a trespass by the command of another, both are trespassers. It is said that no case can be found of a joint action against the sheriff and the deputy. It may be so. And before the case of *Grinnell v. Phillips*, 1 Mass., 530, no action of trespass, I believe, had ever been brought in this state against a sheriff for the misfeasance of his deputy, and it was then much doubted whether an action in that form could be maintained. It is rarely necessary to sue both the sheriff and the deputy, as satisfaction can commonly be obtained of the sheriff. The argument, therefore, derived merely from the silence of the books on this point, has but little weight. But it is said the plaintiff had only the election to sue either the sheriff or the deputy, and I admit that

* The ground of his liability is certainly much better stated in the majority opinion.

there are cases which seem in some measure to countenance this position. (*Peshall v. Layton*, 2 D. & E., 712; *Rawson v. Turner*, 4 Johns., 469.) I do not consider these cases decisive, and, upon general principles, I am of opinion that the sheriff and the deputy may be treated as joint trespassers. The law looks upon them as one person, and they may therefore well be sued together."

But, on general principles, I am sure the sheriff is not regarded as participating in the trespass either by assent, command or ratification, and therefore is not suable as an actual trespasser at all; whereas, an action against the deputy is a direct action for the willful trespass. The want of concurrence of will, of consent, breaks the jointure, and thus prevents the matter from being appropriately tried in a suit against both together. It is somewhat similar to the liability of a surety where a law prevails that the creditor must exhaust his remedy first against the principal debtor. But in the case of the sheriff, he is held responsible for the act, that is, answerable for the conduct of the deputy, and so may be sued in the first instance by the injured party.

SEC. 85. However, if a plaintiff should give the deputy a bond of indemnity, he would by that act become a co-trespasser with the deputy, and could be joined with him in suit; although, on principle, I judge neither could he be joined in a suit with the sheriff in the absence of a direct concurrence of the sheriff, as by accepting the bond and assenting to the act of trespass, or performing it himself.⁴ And, on the other hand, the plaintiff would be concluded by a judgment against the officer, although not himself a party to the suit.⁵

SEC. 86. Where a sheriff is sued upon his official bond, with his sureties, for the malfeasance of a deputy, he has a right to sue the deputy and his sureties. And, in an action for that cause, the defendant deputy and his sureties are concluded by the amount of the judgment recovered against the principal officer in the first action.⁶

⁴ *Lovejoy v. Murray*, 3 Wall., 9.

⁵ *Ibid.*, p. 18.

⁶ *Hand v. Taylor*, 4 Ind., 416.

CHAPTER VIII.

SURETIES.

- Section 87. Ancient and Modern Rules as to the Relation of Principal and Surety, and the Privity between them.
88. New York Doctrine as to the Conclusiveness of a Several Suit against either.
89. Sureties on Deputy Sheriff's Bond.
90. General Rule as to Conclusiveness against Sureties of a Judgment Rendered against the Principal.
91. What the Undertaking of Sureties on an Administrator's Bond is, and their Liability under it.
92. United States Supreme Court on the Conclusiveness of a Suit against the Principal on an Administrator's Bond.
93. Suit against Surety as to Liability of Principal to him.
94. Pennsylvania Doctrine as to Judgments against Principals.
95. Whether Sureties can Dispute either the Breach or the Amount Determined Previously in an Action against the Principal.
96. Suit on Joint and Several Administration Bond.
97. Conclusiveness of a Decree for Mortgage Debt Rendered against an Administrator—Surety cannot assail the Mortgage.
98. Louisiana Doctrine as to Amount of Judgment against Administrator.
99. Default under Guaranty of the Act of Another.
100. Executor or Administrator also Acting as Guardian—Relation of Sureties on the two Bonds.
101. Collusion or Negligence of Administrator as to Pleading.
102. Joint and not Several Official Bond—Conclusiveness of Judgment thereon against the Principal.
103. What might have been Pledged by Principal, but was not Conclusive, Except on Defaults.
104. But in New York Sureties must have had Opportunity to Defend.

Section 105. Judgments in Favor of the Principal.

106. Surety Sued at Law is not Allowed, on Insufficient Defense made therein, to Resort to Equity on the Same Facts merely.
107. Sureties in Judicial Proceedings.
108. Dismissal or Discontinuance of Injunction Suits.
109. What matters Sureties on Injunction Bond may Inquire Into.
110. Suits by Sureties against Principals for Reimbursement — Joint and Several Actions in this particular.
111. What Defenses Principal cannot set up Against the Sureties.

SECTION 87. Although anciently, under the Roman civil law, the relation of principal and surety was not regarded as within the rule of *res inter alios acta*, so that if a creditor recovered against the principal he could use the judgment as conclusive against the surety, yet, at common law, a different doctrine prevailed, so that decisions following the common law rule declare the rule to be that the surety is not concluded merely by a recovery against the principal. The Supreme Court of Vermont¹ thus summarizes the teachings of the latter class of adjudication: "Some of the cases that profess to follow the common law rule make it depend upon what is the true meaning of the engagement which gives rise to the question. They say if the engagement be merely that a particular thing shall be done or omitted by the principal, a judicial decision in a proceeding against him will avail nothing towards establishing the existence of the default on which it is founded, in a subsequent suit against the surety or guarantor. But the same cases maintain the doctrine that when the engagement is virtually, or in terms, to be answerable, not merely or directly for acts *in pais*, but for their legal consequences as ascertained in the course of subsequent legal proceedings, then the result of one action will be conclusive in the other. Ordinarily, where a party has a right of recovery over secured to him either by operation of law or by express contract, and he has given the person so responsi-

¹ *Spencer v. Dearth*, 23 Vt., 104.

ble due notice of the suit; the judgment, if obtained without fraud or collusion, will be conclusive evidence for him against such person upon every fact established by it. The latter, then, cannot be viewed in the light of a mere stranger, but has the same means of controverting the adverse claim as though he were the nominal and real party on the record. It is decided in *Douglas v. Howland*, 24 Wend., 35, and in *Jackson v. Griswold*, 4 Hill, 522, that the relation which subsists between a principal and surety, or principal and guarantor, does not render either of them privy to a suit brought against the other. It has, notwithstanding, been held in a number of the more recent decisions, that an engagement by one man to be responsible for another creates such a privity between them as to render a recovery against the latter *prima facie* evidence in a suit brought on the guaranty given by the former. *City of Lowell v. Parker*, 10 Met., 309; *McLaughlin v. Bank of the Potowmac*, 7 How., 220; *Drummond v. Prestman*, 12 Wheat., 515; *Berger v. Williams*, 4 McLéan 577; *Jacobs v. Hill*, 2 Leigh., 393; *Bryant v. Pye*, 1 Kelley, 355, and *Bradwell v. Spencer*, 16 Ga., 578. These cases deviate, to a greater or less extent, from the common law rule adhered to in *Douglas v. Howland*." The doctrine of the cases of more recent date, as settling the rule, is thus stated by the court: "It would seem that the doctrine of the more recent cases above referred to, is that the relation between joint and several contractors, whether they stand in the relation of principal and surety, or are both principals, creates such privity between them that a judgment for or against one of them, founded on the merits and not on technical grounds, and obtained without fraud or collusion, is evidence for or against the other in a subsequent suit involving the matters adjudicated in the former action. And where the defendant in the second action had notice of the former suit and an opportunity to make defense, or where the defendant in the second action voluntarily appeared and assisted in the former proceedings, or in case of payment made by a co-contractor who is a party of record in the second, but was not in the former action, or a release to

him of the whole cause of action, or accord and satisfaction, where either of such matters is presented in the former action by the party therein, and urged for himself and through his agency for and on behalf of another party not on the record, but having a direct interest arising from express contract or by operation of law to prosecute or defend the suit, and the same is prosecuted or defended with his express or implied countenance, such judgment is conclusive evidence in the second suit of the matters so adjudicated in the former action. And some of these cases decide that such judgment may be *prima facie* evidence of the facts on which it is based, even though the party so interested had no notice of, and took no part in, the trial of the former action in which such judgment was rendered."

SEC. 88. In New York it is held to be the settled doctrine that in a separate action against either principal or surety, the party not joined is not concluded, or even in any wise affected by the result.² And this has been defined to extend so far that if a surety actually conduct a defense in an action against the principal as agent for the principal, he will not be bound, not being a party to the record,³ and the court said that a mere surety for debt is not at common law any more affected by the result of a suit against a principal than a stranger, unless there is such an agreement expressed or implied—with the exception, however, that a result favorable to the principal will release the surety, because the judgment would then extinguish the debt to which the obligation of the surety was a mere incident; and that a judgment rendered in favor of a surety against the creditor would not affect the right of action against the principal debtor, because such a judgment would not extinguish the debt, and the principal debtor would be neither party nor privy to the proceedings.

SEC. 89. In the same state it was held formerly that the sureties on a deputy sheriff's bond are bound without any notice to them, so that the deputy himself had notice of the

² *Deck v. Johnson*, 30 Barb., 289, and cases cited.

³ *Jackson v. Griswold*, 4 Hill. 522.

suit against the sheriff, on the ground that notice to one (the deputy) of the joint obligors was notice to all, and that it was no part of their agreement in the bond that the principal officer (the plaintiff) should give them notice of the deputy's misconduct, and that their liability as indemnitors did not depend therefore on such notice being given.⁴ But the doctrine seems to have been indirectly overruled in a later case in the Court of Appeals, it being held therein that the sureties on a deputy sheriff's bond are not concluded by an action against the principal sheriff for the deputy's acts unless they were notified and given an opportunity to defend.⁵

SEC. 90. The general rule as deducible from the cases is, that a judgment is at least *prima facie* evidence against the sureties, but not always conclusive; and it is thus stated: "When one is responsible by force of law or by contract for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not conclusive, is *prima facie* evidence in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside; but otherwise it is *prima facie* evidence, to stand until impeached or controlled, in whole or in part, by countervailing proofs."⁶ As, for instance, where one is surety for another's conduct,⁷ or where a suit on an administrator's bond is brought, and a judgment is adduced in favor of a creditor against the administrator.⁸ However, in the case just cited, the former judgment was held conclusive against the sureties. The action in which the judgment was obtained was against the administrator alone. He refused to pay the judgment, and an action was brought against the sureties on the bond, and it was held that the judgment not being obtained by fraud or collusion, was conclusive upon them in regard to all matters of defense affecting the merits of the controversy between the parties to the judgment, so that the

⁴ *Fay v. Ames*, 44 Barb., 333.

⁷ *Train v. Gould*, 5 Pick., 38.

⁵ *Thomas v. Hubbell*, 35 N. Y., 121.

⁸ *Heard v. Lodge*, 20 Pick., 53.

⁶ *City of Lowell v. Parker*, 10 Met., 315.

plaintiff being a corporation and the administrator having pleaded the non-existence of the corporation and having failed in the plea, the sureties could not, in the subsequent action against them on the bond, be permitted to deny the existence of the corporation at the time the judgment was rendered. And, also, a judgment against an administrator is conclusive on his sureties as to the amount of the indebtedness, although not against the heirs not made parties.

SEC. 91. Accordingly the Massachusetts court has said: "To most purposes it seems to us that the sureties on an administrator's bond are, as well as the principal, estopped from controverting the validity of a judgment ascertaining the amount of a debt to be paid by the administrator. They are in many respects like the sureties in a bail bond, and equally bound by the proceedings against their principal. The duty they have assumed is that their principal will pay on demand all debts ascertained by judgment of a court of law against him, in his capacity as administrator, if the estate be solvent. His failure to make payment is a breach of the administration bond. The sureties are not to be concluded by a judgment suffered collusively by the administrator, and they have also the right to insist that the action against the administrator shall be commenced within four years⁹ [the limitation period]. In Maine there seems also to be added (in an early case) this exception, that if the administrator failed to plead a want of assets, and the estate was really insolvent, the sureties may put in the plea as a defense to the subsequent action against them.¹⁰

SEC. 92. The United States Supreme Court has held that a former judgment against an administrator is conclusive against his sureties, except that it is open to prove fraud or collusion;¹¹ in which, however, it seems to overthrow the earlier doctrine holding the whole matter *prima facie* evidence only.¹²

⁹ *Heard v. Lode*, 20 Pick., 58.

¹⁰ *Hays v. Seaver*, 7 Greenl., 239.

¹¹ *McLaughlin v. Bank of Potomac*, 7 How., 230.

¹² *Drummond v. Prestman*, 12 Wheat., 520.

SEC. 93. In Arkansas it is held that a judgment in a suit against the surety is sufficient *prima facie* evidence of the liability of the surety and of the consequent liability of the principal to him, although the principal might show collusion between the creditor and the security;¹³ and the principal needs not to have had notice of the prior suit.¹⁴

SEC. 94. In Pennsylvania it is held that either official sureties¹⁵ or sureties of an administrator¹⁶ are concluded by a judgment against the principal. As to the former, however, the doctrine seems to have been regarded by the court as an innovation, in employing the following language: "Seeing, then, that it has become a settled rule of the law in regard to the sureties on a constable's bond that a judgment obtained in a suit brought against the constable alone for official misconduct or neglect of duty will bind and be conclusive on them, though not notified of the suit; they must be presumed to have known that such was the law when they entered into the bond; and it must, therefore, be taken as a part of their obligation or agreement that they were willing to be so bound and concluded, as often as judgment should be so obtained against their principal, and hence those who have become sureties for constables since the establishment of the rule in this respect can have no reason to complain of it. Under this view, then, it would seem that the objection originally made to the establishment and application of such rule to the sureties of a constable has lost its force, and the tendency of the rule, in its operation, being to prevent creditors from being vexatiously and unreasonably delayed in having or obtaining execution of their judgments—which it is said is the life of the law—strongly recommends it on the ground of expediency and public policy."

SEC. 95. Where the plaintiff brought an action against the sureties of an executor who had died, and a general plea of

¹³ *Bone, Adm'r, v. Torrey*, 16 Ark., 86.

¹⁴ *Chipman v. Fambro*, *Id.*, 291.

¹⁵ *Garber v. Commonw.*, 7 Barr, 265.

¹⁶ *Evans v. Commonw.*, 8 Watts, 399.

performance was put in by the defendants, and the replication to this plea was that assets had come into the hands of the executor, but he had neglected nevertheless to pay a judgment against him, on which issue was joined, it was held that the judgment was admissible and conclusive against the sureties to show a breach of the bond, and the amount of damages,¹⁷ on the ground that the obligation of a surety being dependent on that of the principal debtor, causes the surety to be considered as the same party with the principal debtor as it regards any matter determined against him, or in his favor; and that, inasmuch as the principal, if living, could not have been permitted to dispute again the breach or the amount, neither could his sureties. But the same case holds that the claim must first be maintained by *due course of law* against the principal, and that it is not sufficient to produce a mere written evidence of indebtedness. The creditor must institute suit against the personal representative, because it is in the first instance a dispute between him and the creditor as to whether such a debt exists at all—a dispute which the sureties are not competent to manage. And then, after judgment obtained, the non-payment thereof is a breach of the administration bond.¹⁸

SEC. 96. Where suit is brought on an administration bond, which is joint and several in its terms, or on construction of law, all must be sued jointly or only one at a time. If there are three or more, two cannot be joined and then another be sued, etc.¹⁹ This is the rule as to all joint and several contract liabilities, though it is otherwise in cases of joint tort.

SEC. 97. Where an amount is decreed to be due upon a mortgage, and to be paid by an administrator out of the assets of the estate, and he fails so to do, having available assets at command, a suit will lie upon the bond against the sureties, and it is not competent for the sureties to assail the original

¹⁷ *Willey v. Paulk*, 6 Conn., 75.

¹⁸ *Ibid.*, citing *Braxton v. Winslow*, 1 Wash. (Va.), 31, and *Cony v. Williams*, 9 Mass., 114.

¹⁹ *Hobbs v. Middleton*, 1 J. J. Marsh, 178.

mortgage on which the decree was founded, and thus re-litigate what had been decided in the mortgage suit.²⁰

SEC. 98. In Louisiana, however, the rule is that the amount of the judgment against the administrator, though *prima facie*, is not conclusive evidence against the surety in a subsequent suit on the bond; it may be rebutted.²¹ This is doubtless an exception to the general rule in such cases.

SEC. 99. It is a general rule that where one guarantees the *act* of another, though conditionally, his obligation is commensurate with the obligation of the principal, and he is no more entitled to any notice of a default than the principal. Both must at their peril take notice of any default—as in a promise to indemnify against liabilities to be incurred by another, or on a promise to pay what should appear to be due from the plaintiff to his attorney, or to pay rent due from another. In all such cases, where either party can obtain notice by inquiry, none needs to be given, and if the guarantor intends to insist on notice or request, he must make this an express condition of his contract, and without this the engagement is regarded as absolute to pay when the default occurs.²²

SEC. 100. It is held that where an executor or administrator also acts as guardian for minor legatees, or distributees, he can elect to hold the shares of these as *guardian*, and so charge the sureties on his *guardian's* bond and exonerate those on his bond of *administration* by means of some definite act from which the election to do so may be inferred fairly. This, too, may result from operation of law, as where the distributive shares have been determined, and it has been held a breach of the *guardian's* bond to *refuse* or *neglect* to retain the amount as *guardian*, from any assets in hand as administrator's fund for distribution. Thus, Justice STORY says: "If it be the right of the administrator to retain a debt due to him in his own right, or in the right of another, the doctrine

²⁰ *McCalla's Admr. v. Patterson*, 18 B. Mon., 210.

²¹ *Ferguson v. Glaze*, 12 La. An., 668.

²² *Douglass v. Howland*, 24 Wend., 48, and cases cited.

equally applies where he unites in himself the character of guardian, and has assets in his hands to discharge the debt due to his ward. I go further, and consider it the duty of the administrator to retain, under such circumstances, and if he were to yield up the assets without such retainer, it would, in my judgment, be a mal-administration of his guardianship, for which, in case of loss, he and his sureties might be justly held responsible upon the guardianship bond. Suppose, for instance, in the present case the sureties upon the administration bond were insolvent, and those upon the guardianship bond were solvent, it would be difficult to perceive upon what ground the latter could resist payment of the amount of the distributive shares of the minors, since the administratrix would be bound to retain as guardian."²³ But in a later case, he held that the transfer does not take place by the mere operation of law, without any act of election by the administrator and guardian.²⁴ Such act may be merely an admission of assets and an admission of responsibility as guardian.

SEC. 101. The rule in Massachusetts appears to be that the sureties can so far inquire into the rendering of a former judgment against an administrator, as to avail themselves of any plea which the administrator negligently or collusively failed to enter. This is the general rule as it regards collusion, but doubtless would not be generally acquiesced in as to mere negligence, as, for example, in pleading the statute of limitations, concerning which it has been held that it is in the discretion of an administrator to plead the statute, since the claim may possibly be just even if it has passed beyond the limitation, and the administrator may, therefore, be willing to pay it. But the Massachusetts court holds that if an administrator does not plead the statute of limitations, the sureties may do so in a subsequent suit on the bond if the administrator has failed so to do in the original action. Says the court, "he was obliged to make that defense for the protection of the

²³ *Taylor v. Deblois*, 4 Mason C. C., 136.

²⁴ *Pratt v. Northam*, 5 Mason C. C., 109.

heirs, devisees, legatees and purchasers of the estate which he represents, for the statutes were made for the benefit of all interested in the estate, as well as for the convenience and safety of executors and administrators. * * * *

We are clearly of opinion that under these circumstances [of failure so to plead] the executors of the surety have a right in the present action to plead the same matter in their defense, not being barred by a judgment suffered collusively or negligently by the administrator, from a protection which the law intended for their benefit."²⁵ But in a note in the second edition of the reports, attached to the case, the editor vigorously criticises the opinion; yet I am not aware that it has ever been overruled in that State.

SEC. 102. In a joint bond which is not also several, the sureties are precluded from disputing a former judgment against the officer for whom they are responsible, because he himself cannot dispute it again, and have the matters re-litigated, and he is a necessary joint party in the second action which seeks to charge the sureties. The first judgment, therefore, concludes them as well as him as to the fact of the liability and the amount of damages.²⁶

SEC. 103. And whatever might have been pleaded by the officer in the original suit against him—in States where the statute requires first a suit against the officer before a suit on the bond against him and his sureties—will be held to conclude the sureties from setting up the defenses which would have thus been available before, unless the judgment was taken by default.²⁷

SEC. 104. But in New York it is held that the sureties on the bond of a deputy sheriff are not concluded by a judgment against the principal sheriff for an act of the deputy, unless they have had an opportunity to come in and defend.²⁸

SEC. 105. As to official sureties availing themselves of a

²⁵ *Dawes v. Shed*, 15 Mass., 9.

²⁶ *Tracy v. Goodwin*, 5 Allen, 412.

²⁷ *Bradley v. Chamberlain*, 35 Vt., 277.

²⁸ *Thomas v. Hubbell*, 35 N. Y., 120.

judgment formerly rendered *in favor* of their principal, it seems clear on rule, and on authority, to be allowable. Thus the Georgia court says: "The sole question here is whether or not the sureties of the sheriff can avail themselves of the former judgment in favor of their principal, they not being parties to that judgment. We think they can. The sheriff could, beyond doubt, protect himself by the judgment, and when he is clear we think his sureties are clear. The responsibility is for his default, and he is in default when he acts against the judgment of the courts, and not when he acts in conformity with them. He was not in default in refusing to account again for this money after there was a judgment of the proper court that he had already accounted for it once, and was not bound to account for it any more."²⁹ And so, as to the sureties of an administrator; if no action can be maintained against him none can be maintained against them, and if he prevail in a suit against him the judgment in his favor protects them.³⁰ And on like principle, where a judgment is actually rendered against a surety, it cannot be enforced if the principal has been since released by a judgment in his favor annulling the liability or obligation.³¹

SEC. 106. Where a surety is sued at law and makes a defense which, though admissible is yet ruled as insufficient, he cannot afterward obtain relief in equity on the same facts merely, because there is nothing in the nature of a surety's defense to give it a peculiarly equitable character; so that, whatever would either exonerate him or bind him in one court ought to do so in the other.³²

SEC. 107. The case of sureties in the course of judicial proceedings remains to be noticed. Where a judgment is rendered against one who is subsequently arrested on execution, whereupon he enters into a recognizance, and the recognizance

²⁹ *Brown v. Bradford*, 30 Ga., 928.

³⁰ *State, to use, etc., v. Coste*, 36 Mo., 437.

³¹ *Dickason v. Bell*, 13 La. An., 249.

³² *King v. Baldwin*, 2 Johns. Ch., 557.

is forfeited, the judgment under which the execution issued is held conclusive against the surety in the action against him on the recognizance.³³ And it is the same in an action against the surety on a bond to dissolve an attachment.³⁴ And so the surety on an injunction bond cannot question the correctness of the decree rendered in the injunction case, although he is not left without remedy against fraud and collusion between the parties, but may bring a suit in chancery for relief against the bond itself.³⁵ Yet, even in such an action, he cannot be permitted to litigate the correctness of the decree,³⁶ but only the fraud or collusion alleged. The principle involved in such cases is simply that, by signing the bond the surety voluntarily assumes such a connection with the injunction suit that he is naturally concluded by the decree in the subsequent suit on the bond, so far as the same matters are in question,³⁷ notwithstanding the court of equity has no jurisdiction as to the bond which must be enforced against the principal and sureties in a court of law,³⁸ the office of the decree being merely to declare the liability of the parties to it, and affecting the sureties only as it fixes such liability, and thus determines the amount recoverable on the bond.³⁹

The rule just stated, however, seems not to prevail in Tennessee, where the court of chancery has jurisdiction to entertain a motion against the sureties, and decree against them, on the ground that by executing the bond in that court they had so far made themselves parties to the injunction suit as to confer jurisdiction on the court to decree against them.⁴⁰

The rule as to concluding sureties is the same in a replevin suit, and subsequent suit on the bond.⁴¹

³³ *Way v. Lewis*, 115 Mass., 26.

³⁴ *Cutter v. Evans*, 115 Mass., 27.

³⁵ *Allen v. McKibbin*, 5 Mich., 449.

³⁶ *McBroom v. Sommerville*, 2 Stew. (Ala.), 515.

³⁷ *Towle v. Towle*, 46 N. H., 434.

³⁸ *Sturjis v. Knapp*, 33 Vt., 522; *Bean v. Heath*, 12 How. (U. S.), 168.

³⁹ Same, p. 521.

⁴⁰ *Black v. Caruthers*, 6 Humph., 91.

⁴¹ *Warner v. Mathews*, 18 Ill., 86.

SEC. 108. The dismissal of an injunction suit is sufficient to entitle the defendant to sue on the bond; or even a voluntary discontinuance. The California court says on this point: "Looking at the matter in the light of principle, it would seem that the failure of a plaintiff to prosecute his suit should be regarded as a concession of his inability to maintain it. The issues are not actually examined and passed upon, but by his failure to appear he virtually confesses that the result of a trial would be to find them against him. A dismissal, under such circumstances, must be understood as proceeding upon this idea, and, so far as relates to the case itself, as determining everything involved in it. In effect, a dismissal is a final judgment in favor of the defendant, and although it may not preclude the plaintiff from bringing a new suit, there is no doubt that for all purposes connected with the proceedings in the particular action, the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits." And further, as to the action on the bond after a decision by dismissal or on trial, the court say: "It is for the court to determine whether the injunction was properly or improperly issued, and no action can be maintained upon the bond until such determination has taken place. The undertaking of the parties, in such cases, is that they will pay, etc., if the court shall finally decide that the plaintiff was not entitled to the injunction, and the statute evidently contemplates a decision in the injunction suit. It is clear that until a decision to that effect has been obtained, no right of action exists upon the bond."⁴²

SEC. 109. The matters which may be inquired of by the sureties in the second suit on the bond are stated to be fraud, collusion, payment, or clerical mistakes in entering up the judgment against the principal.⁴³

SEC. 110. It is not amiss here, I judge, to refer to suits by

⁴² *Dowling v. Polack*, 18 Cal., 628, and cases cited.

⁴³ *Manufacturing Co. v. Worster*, 45 N. H., 112, citing 4 McLean C. C., 577.

sureties *against* their principals for reimbursement of what they have had to pay under judgments on the bonds, or to avoid suits, etc. The first rule in this matter is that where there are several sureties they cannot join in an action against the principal at common law. But there are statutory provisions in some of the States allowing sureties to join against the principal, where *they* are sued jointly on *their* liability. Thus, a statute in Ohio, which allowed the surety in a summary proceeding to obtain judgment against the principal immediately on judgment recovered by the creditor, was held to require the construction that the sureties *must* all join where there are two or more, and must likewise all be joined by the creditor. The common law rule and the statute are thus contrasted by the court: "At the common law a surety has no action against his principal until such surety has paid the money, and the remedy extends no farther than to recover back the amount paid as in any other case of money paid for the defendant at his request. This being the rule, the action of every surety must be for his own advances, and must be, in its nature, separate. For, although two or more joined as sureties in the writing, that act gave them no right, even if it could be considered a joint act. Each surety could recover the amount he had paid, and no more; and the principal, though subject to the expense of separate suits, could not be subjected to a judgment for any greater sum than his own original debt. Our statute gives to the surety a totally different remedy; it authorizes the surety to sue a severe process, and obtain a summary judgment against his principal so soon as the creditor shall have obtained judgment against the surety. The judgment is to be rendered for the proper amount, which, of course, must be the amount of the judgment against the security. The foundation of this proceeding in favor of the surety is totally different in principle from the proceeding at common law. It is not the amount paid by the surety, but the whole amount of the judgment for which the surety may proceed against the principal. Where there are, as in this

case, four sureties, upon the doctrine contended for by the defendant in error each is entitled to a separate judgment against the principal for the whole amount. And each, upon the hypothesis that he might be compelled to pay, would claim to proceed and collect the whole amount of his judgment. Thus a necessity might be created for more litigation to settle and adjust all the rights of the parties. The court conceive that this would not be a reasonable construction of the statute. The judgment which gives the right of the surety to sue is an entire and single judgment against all; the right it confers upon them must also be entire."⁴⁴

SEC. 111. Where a surety sues his principal it is not competent for the defendant to set up as a defense the unskillfulness of the defense of the first suit wherein the surety and principal were sued together, and judgment rendered which the surety paid, and thereon instituted the present suit.⁴⁵ Nor, in a suit to recover for money paid as surety on a replevin bond, is it allowable to set up as a defense that the plaintiff when he signed the bond knew that the replevin suit was groundless and malicious.⁴⁶ Nor, where judgment has been obtained against principal and surety and the surety sues the principal for the amount he paid on it, can the defendant set up as a defense against the surety's claim that a part of the judgment paid by the surety was for usury.⁴⁷

⁴⁴ *Litler v. Hersey*, 2 Ohio, 209.

⁴⁵ *Smith v. Rivies*, 32 Me., 177.

⁴⁵ *Rice v. Rice*, 14 B. Mon., 418.

⁴⁷ *Wade v. Green*, 3 Humph., 558.

CHAPTER IX.

WARRANTORS OF TITLE.

Section 112. Damages for Ouster bars action for Use and Occupation.

- 113. Vouching Warrantor.
- 114. Notice to Grantor is Notice to his Heirs and Representatives.
- 115. What Notice to Grantor must be.
- 116. Effect of want of Notice.
- 117. Notice needs not to be in Writing.
- 118. Heirs and Devisees of Grantor joining in Suit against Warrantor.
- 119. What Justifies Action on Warranty.
- 120. What is a Breach of Covenant for Quiet Possession.
- 121. "Disturbance of Possession" Construed.
- 122. Actual and Substantial Evictions.
- 123. Intent as to Character of Entry.
- 124. Destroying Usefulness not a Disseizin.
- 125. Breach of Covenants of Seizin and against prior Incumbrances.
- 126. Rules governing Actions against Warrantor.

SECTION 112. A judgment on a covenant of warranty for damages for ouster from a portion of the land by an adverse paramount title is held to be a bar to a subsequent action on the same covenant for what the plaintiff has had to pay the owner of the title for use and occupation previously.¹

SEC. 113. Where a paramount title is set up against the warrantee, it is his duty to vouch the warrantor in order to bind him by the result of the judgment. The rule is thus

¹ *Osborne v. Atkins*, 6 Gray, 423.

stated: "If a person sell real or personal property, with a warranty of title, and the purchaser finds, upon suit brought, that the validity of the title is denied, he may notify his warrantor to maintain the title in the suit so brought, and if the warrantor, upon reasonable notice and with a fair opportunity to maintain his rights in the suit neglects or refuses to do so, and a recovery is had against the title so warranted, such judgment, if obtained without fraud or collusion, will be conclusive evidence against the warrantor upon every fact established by it. This principle is of familiar application in warranties of real estate."²

SEC. 114. But if one claims land under a warranty deed, and enters suit to recover possession thereof, and notifies the grantor to appear and make title, and the grantor dies while the suit is pending, there is no need of further notice being given to the grantor's representatives; but, without such notice, the judgment in the ejectment suit is conclusive against the representatives in a subsequent action on the covenant of warranty, unless it can be made to appear that the former suit failed because of some act or neglect on the part of the grantee, or assigns;³ and a similar rule seems to prevail as to personal property.⁴

SEC. 115. It has been held that the notice must be clear and express, and must, moreover, be a notice requiring the defense of the title. Says the Pennsylvania court: "An eviction by a paramount title is *prima facie* evidence in favor of the warrantee in a suit on the warranty. And if the warrantee takes the precaution to vouch or call in the warrantor to warrant and defend the title, the recovery in ejectment is conclusive. It was on the principle that the warrantor had been vouched that the court excluded evidence of title in the warrantor at the time of the conveyance. The only doubt is as to the application of the principle. Mr. Aldricks says he drew

² *Carpenter v. Pier*, 30 Vt., 87.

³ *Brown v. Taylor*, 13 Vt., 638.

⁴ *Blasdale v. Babcock*, 1 Johns., 518.

the forms of the notices to Mr. Paul before the case was tried; that Paul came to him and talked about the cause, and said he had an agreement that would defeat the plaintiffs in ejectment; that he was uneasy about it and that he notified him of the trial. The notices were not produced, nor are their contents proved, nor is there any proof that they were served. The evidence amounts to nothing more than that the warrantor knew of the ejectment, and that he had notice of the trial; but it nowhere appears that he was vouched or required to defend the title. To have the effect of depriving the warrantor of the right to show title, the notice should be unequivocal, certain and explicit. A knowledge of the action, and a notice to attend the trial will not do, unless it is attended with express notice that he will be required to defend the title. When the warrantor is properly vouched, he becomes, in effect, the real party in interest in ejectment.”⁵

SEC. 116. If the warrantor has not had such notice, he may be permitted to show in the action on the warranty that the title conveyed by his deed was better than that which had prevailed against the grantee in the prior action of ejectment. In the absence of such notice to defend the title, the judgment in the ejectment suit is only *prima facie* evidence against the warrantor, and may be rebutted in the suit on the warranty.⁶

SEC. 117. It does not appear that the notice needs to be in writing, and if it is not, the question of notice is a matter *in pais*, and is a question of fact to be decided by the jury, and not one of law for the court.⁷

SEC. 118. Whether heirs or devisees may join in a suit against the warrantor on a covenant made with the testator or intestate, is not very clear. But it is held they may and ought to join, after suffering eviction. The Pennsylvania court say: “Whether the plaintiffs can sustain a joint suit is a point not without difficulty. The contract was made with

⁵ *Paul v. Witman*, 3 Watts & S., 409.

⁶ *Collingwood v. Irwin*, 3 Watts, 310.

⁷ *Ibid.*

the testator, and it would be unreasonable that he should be at liberty by devising the land in separate parcels to subject the warrantor to as many actions as there were devisees. Suppose the warrantor, on eviction of the warrantee, is ready and willing to pay, how is he to ascertain the proportion to which each of the devisees is entitled, when the portions of the real estate devised are of unequal value? Is the warrantor to be liable to as many suits as there are heirs? Although, as between themselves, their interests are several, yet as respects the warrantor they hold a joint interest, and as such may sue jointly. Of this, as it is for his benefit, the warrantor cannot complain. When a joint interest is created, either by the parties or by act of law, the covenantees cannot sever in the action. And the reason assigned is, that if several were permitted to bring distinct actions for one and the same cause when the interest is joint, the court would be in doubt for which of them to give judgment. (*Stingsby's Case*, 5 Co., 19; 1 East., 500.) That all the heirs should join in the suit is but justice to them as well as the covenantor, for they are equally entitled to the money. Devisees may apportion the money between themselves, and why compel them to bring separate suits when it is to their advantage, as well as the warrantor's, that the suit should be joint? Whether separate suits will not lie may perhaps be doubtful.”⁸

SEC. 119. To justify an action on the warranty, it is sufficient that there should have been a judgment, in a claim case, finding that the land was subject to the payment of an execution against the warrantor, although the land may not have been sold under the judgment, and the vendee may not have been actually evicted from the possession.⁹

SEC. 120. A covenant for quiet possession does not extend to a tortious eviction. For it is held that by the entry of a wrong-doer the covenant of warranty is not broken, because no mischief arises to the covenantee therefrom which he can-

⁸ *Paul v. Wiseman*, 3 Watts & Serg., 409.

⁹ *Harbin v. Roberts*, 33 Ga., 49.

not remedy by an action of trespass or ejectment. But when he is ousted, by a superior or paramount title, he is without remedy except by covenant against the warrantor. It must be both a lawful and superior title which evicts him.¹⁰ And so, where a grantee has been successfully prosecuted in trespass by a third party claiming title, and consequently brings an action for breach of the covenant of quiet enjoyment, he must aver and prove that such third person, at the date of the covenant, or before it, had lawful title by virtue of which the plaintiff was entered upon and ousted¹¹—that is, there must be an allegation of actual eviction, and of the lawfulness of the title under which the eviction took place. The Supreme Court of New York, in an early case, said: “After a full examination of the cases relative to this point, and especially those cited on the argument, we do not find one where an action of covenant has been brought on a covenant for quiet enjoyment in which it is not expressly alleged that there was an entry and expulsion from the possession, or some actual disturbance in the possession. The allegation of an entry and expulsion are so much of the essence of the action that there are several cases in which issue is taken on that fact, notwithstanding in those very cases, a lawful title, superior to the one conveyed by the deed containing the covenant for quiet enjoyment, is alleged. In good sense, the covenant for quiet enjoyment has reference merely to the undisturbed possession and not to the grantor’s title. In the present case, judging from the deed, it was never the intention of the grantor to covenant that the lands were free from incumbrance. From precedents, and as no authority has been shown that the covenant for quiet enjoyment is broken by any other acts than an entry and eviction, or a disturbance of the possession itself, we are of opinion that the demurrer is well taken.”¹² In a prior case, it was objected that the plaintiffs had omitted

¹⁰ *Kelley v. Dutch Church*, 2 Hill., 110.

¹¹ *Webb v. Alexander*, 7 Wend., 281.

¹² *Waldron v. McCarty*, 3 Johns., 473.

to state that the expulsion was by a lawful title. And thereon the court said: "The eviction stated in the declaration does not appear, nor is it averred, to have taken place by process of law; covenants for quiet enjoyment and a general warranty extend only to lawful evictions. * * * * In the present case it is not alleged that the ouster was committed by any person having right or superior title."¹³ And so it is not sufficient to allege that there had been a mortgage foreclosed older than the conveyance from the grantor, and that the plaintiff, to avoid being ousted, had been compelled to purchase the land under the mortgage;¹⁴ nor that, at the date of the grantor's deed, and long before, the premises had been adversely, by lawful title, held and enjoyed under a patent, since herein is no actual eviction or disturbance set forth as a groundwork for the action of covenant.¹⁵ And the rule is the same under a covenant of general warranty as well as under that of quiet enjoyment.¹⁶ Even a judgment will not suffice in New York, unless there is an actual ouster. The court says: "In the case before us there is, to be sure, a judgment against the plaintiff, and nothing wanting but a writ of possession to constitute a breach of the promise. But this being a technical rule, applicable to this covenant, the covenantor ought not to stop short of an actual ouster if he means to rely upon his covenant; he has no right to make any compromise until an actual breach has been shown."¹⁷ But I do not think the rule would be carried so far in most of the states.

SEC. 121. It is held that where the words of the covenant are, "disturbance of the possession," it will be construed to signify an eviction or removal of the tenant from the possession—this being held to be the legal intendment of the ex-

¹³ *Greenby v. Wilcocks*, 2 Johns., 4.

¹⁴ *Webb v. Alexander*, *supra*.

¹⁵ *Kortz v. Carpenter*, 5 Johns., 120.

¹⁶ *Kent v. Welch*, 7 Johns., 258; *Vanderkarr v. Vanderkarr*, 11 Johns., 122.

¹⁷ *Kerr v. Shaw*, 13 Johns., 238.

pression when referred to the breach of covenant.¹⁸ And, accordingly, anything short of this, either literally or substantially, is to be regarded merely as a trespass.

SEC. 122. Where a literal or substantial eviction is allowed to be an equivalent to an actual eviction, the question then will naturally arise, what is a substantial eviction? Thus it has been defined by the Connecticut court: "A turning out by the shoulders, said Lord Mansfield, in *Fisher v. Prosser*, Comp., 218, is not necessary to constitute an ouster. It is sufficient that an act has the same effect, and falls within the same reason. Thus, if it be made to appear that a person who holds land adversely denies the title of his co-tenants, claims the whole possession for himself, denies the possession to others, or takes the whole profits of an estate, and refuses to account, these acts respectively are not an ouster, strictly speaking; but they are evidence of ouster, and may, in essence, amount to it. The secluding a man from the seizin, in whatever manner it may be effected, is a disseizin or ouster; and if by paramount title, it is a breach of the covenant of warranty. Thus, the levy of an execution on land with seizin and possession delivered (*Gore v. Bazier*, 3 Mass., 523); the yielding up of the possession to a person claiming it, whose title was undoubted and therefore irresistible (*Hamilton v. Cutts*, 4 Mass., 349); the refusal of possession by a person occupying under elder title (*Dewall v. Craig*, 2 Wheat., 61); these, and an infinite variety of facts of the same kind, although not actual eviction in the letter, are really such in their spirit and effect."¹⁹

SEC. 123. Moreover, the character of an entry, as to whether it is or is not an eviction, depends somewhat upon its intent: "In the first place, an entry on land conveyed to take the water, and the actual taking of it, constitute no eviction or disseizin. Some entries on land, unwarrantably, are trespasses only, while others are ousters removing the tenant from the possession. It is said by Sir Edward Coke, 1 Inst.,

¹⁸ *Mitchell v. Warner*, 5 Conn., 523.

¹⁹ *Ibid.*, 521.

181a, that 'every entry is no disseizin unless there be an ouster of the freehold, and therefore Littleton doth not set down one entry only, but an ouster also.' The character of the entry depends on the intent and purpose for which it is made. If the entry was under claim or color of title to the land (*Smith v. Burtiss*, 6 Johns., 197), the object was to dispossess the tenant, and undoubtedly constituted an eviction. But if it were to take some of the produce of the land, or to use it in any manner without claim of right or title to possess otherwise than in passing over it may be a trespass, but it is no ouster. (*Whitbeck v. Cook*, 15 Johns., 483.) An entry to dig turf is no eviction. (1 Inst., 4 b.) The same may be said of an entry to take fish, to water cattle, to wash in a spring, to dry nets, to draw a seine or to cut wood. None of these destroy the owner's seizin, because this consists in an exclusive, permanent possession of the land, which such entries for a partial use have never been deemed to impair. If lawful, they are easements comprising no claim to the land itself; as was justly said by SWIFT, Ch. J., in *Peck v. Smith*, 1 Conn., 135: 'It supposes,' said he, 'that different rights in the use of the same thing may co-exist in different persons, and nothing is more common than for one to have an easement in the land of another who has an estate in fee, and is in actual possession. Suppose a grant to one to draw water at the well of another; here the grantee may pass a thousand times a day to the well, but he does not dispossess the grantor; the rights of each are perfectly compatible.'²⁰

SEC. 124. Merely rendering an occupation useless does not amount to an eviction. Says the Connecticut court: "The plaintiff has insisted that the water works having been *rendered useless* by carrying away the water, this, by consequence, is a disseizin of the water works. If it were, it would be of no avail. The covenant, by taking away the water, would be broken if it was embraced within it; but as it is not, it neither directly nor consequentially is of this character. But the

²⁰ *Mitchell v. Warner*, 5 Conn., 524.

principle contended for is not tenable. To tear down a fence surrounding a pasture, to cut up the floor of a house, to destroy the windows, and various other acts easily imagined may render a thing useless; but they do not amount to an eviction or ouster. The obstructing of the passage of a person to a chamber by shutting it up is virtually an expulsion from it, but this is widely different from merely rendering a thing useless. It may thus exist, without use, in the possession of the owner, who, though he cannot complain of an eviction, may demand damages for a trespass. It is said by Lord COKE (1 Inst., 161 a), that 'the turning of the whole stream of water that runs to a mill is a disseizin of the mill itself;' and this is cited as if an actual eviction was intended. But this is in opposition to fact, the most obvious and demonstrable. The covenants of warranty and for quiet enjoyment are broken only by an ouster in fact, or that which is precisely tantamount.

* * * * *

In *Hunt v. Cope*, Comp., 242, it was adjudged that 'in replevin upon distress for rent, a plea in bar that the defendant pulled down a summer house whereby the plaintiff was deprived of the use thereof, without saying that he was expelled or put out of the same, is insufficient, this being a mere trespass but no eviction.' The taking away a pest house in *Roper v. Lloyd* (Sir T. Jones, 148), was held to be a trespass only.²¹

SEC. 125. As to covenants of seizin and against prior incumbrances, they are broken instantaneously, if they are false; otherwise, they are never broken.²²

SEC. 126. With these definitions in view, we can readily determine how far a judgment against a grantee must extend in order to conclude the grantor in a subsequent action of covenant upon the warranty to the grantee; and, we may sum up the rules regulating the matter thus:

1. There must be an actual eviction of the warrantee, or an equivalent thereto, by suit or otherwise, to justify an action on the covenant.

²¹ *Mitchell v. Warner*, 5 Conn., 528.

²² *Ibid*, 502.

2. If, in a suit involving the title of the grantee, the grantor is duly notified of the pendency of the suit, he will be concluded by the judgment against the grantee from litigating the same matters anew in a subsequent suit on the warranty.

3. But if the former judgment does not extend to an actual eviction, it is competent for the warrantor, if sued on the covenant, to show that there is no eviction by the former judgment.

4. Where an actual and not a merely virtual or substantial eviction is necessary, as in the State of New York, there must not only be a judgment of eviction, but it must have been executed by a writ of possession, or by an actual yielding to it on the part of the grantee, before a suit can be brought on the covenant.

CHAPTER X.

MUNICIPAL CORPORATIONS.

- Section 127. *Respondeat Superior* as to Municipalities Defined and Explained — General Rules Governing the application.
128. As to Negligence of Citizens.
 129. Effect of Mutual Negligence of City and Employee or Citizen committing Injury — Relative degrees of Guilt.
 130. Railroad Company answerable over to a Municipal Corporation.
 131. Notice to Party answerable over Necessary.
 132. Obstructing Street or Highway — Evidence in the Second Suit.
 133. Negative Offenses — Neglecting Repairs.
 134. Responsibility of City for the Fall of Awnings.
 135. Representation in Assessments for Local Improvements.
 136. Judgment Against County or City, how Binding on the Individual Citizens — Elaborate Iowa Case, and Dissenting Opinion therein.

SECTION 127. The doctrine of *respondeat superior* applies to the liabilities of municipalities for nuisances caused by the negligence of their residents. They can be held liable, and then recover from the originator of the nuisance the amount they are compelled to pay for injuries proceeding from his negligence. The Supreme Court of the United States say: "It is well settled that a municipal corporation having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used

the streets as to produce the injury, unless *it* was also a wrong-doer. If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered, if he knew that the suit was pending and could have defended it. An express notice to him to defend the suit was not necessary in order to charge his liability."¹ The rules herein stated then are, 1. That where the city has been compelled to pay damages for individual negligence, the individual whose negligence caused the injury complained of may be held answerable over to the city. 2. But he must have notice—not formal notice, but some kind of notice, direct or indirect—of the pendency of the action against the city, in order that the result will bind him.² 3. The city, however, cannot recover if it is likewise in fault, it being the rule of law that there can be no contribution enforced by one wrong-doer upon another.³ What are nuisances which will render a municipality thus liable, does not fall within the compass of our investigations in this work, except merely to state the rule to determine the question. "Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results *directly* from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do these acts is equally liable to the injured party,"⁴—and hereby is to be determined the party responsible to the city, whether the employer or the contractor.

SEC. 128. Of course, in the strict definition of the term, *respondeat superior* applies to the acts of agents under the direct employment of the municipality; but it is proper to use the phrase in a more extended sense, for the liability of a municipal corporation for the acts of its citizens in cases of

¹ *Chicago v. Robbins*, 2 Black., 422.

² Same Case, 4 Wall., 672.

³ *Ibid.* 424.

⁴ Same Case, 4 Wall., p. 679.

injury from negligence. The rule of liability laid down at the close of the last section applies to individual and corporate employers; and, as to the latter, it is thus stated: "If a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible, but not for the misconduct or malfeasance of such persons as he is obliged to employ."⁵

SEC. 129. The rule that if a city is guilty itself of negligence, it cannot claim against the party by whom the wrong was actually committed, is relaxed in Massachusetts, and it is held that if the parties are not *equally* criminal, the principal wrong doer may be held responsible by his associate. And although, where moral turpitude exists, the rule of exclusion prevails because in such cases the court will not inquire into *relative degrees* of guilt, but will hold all concerned equally guilty, yet where the offense is merely *malum prohibitum*, and is not immoral, the relative blame will be inquired into, and justice will be administered as between the wrong-doers themselves.⁶

SEC. 130. The town of Lowell had been compelled to pay damages by reason of an injury sustained from driving into a deep cut in the night time, which cut was made in the course of a railroad excavation for constructing the track. The defense was made, that the railroad company had employed an agent or servant to keep up a barricade to prevent persons from falling into the cut, and that this agent, by his negligence in the discharge of that duty, had caused the accident, and the company were not responsible for his acts. But it was held that he was acting under the express orders of the company therein, who had been intrusted by the legislature with the execution of the work of constructing their road, and that they were bound, in so doing, to protect the public from danger; that they could not delegate this responsibility

⁵ *Bailey v. Mayor etc. of New York*, 3 Hill, 538.

⁶ *Lowell v. R. R.*, 23 Pick., 32.

to others, and that the work was done on land appropriated for that purpose by the corporation, and under its authority vested in them by law.⁷

SEC. 131. The necessity of notice, in the first suit, to the party answerable over, seems to be recognized by all the authorities, although sometimes holding that the notice needs not to be direct or express, but that if he has notice from the circumstances of the case it is sufficient. And the law is thus stated by the New Hampshire court: "When a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record." In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion (*Coates v. Roberts*, 4 Rawle, 100), will be conclusive against him whether he appeared or not.⁸

SEC. 132. Obstructing a street or highway is one of the instances for which a city is held liable, and then is entitled to reimbursement from the party placing the obstruction. And a judgment in the first action is conclusive on the matters involved, whether these appear from the record itself, or from proofs *aliunde*; and it has been held that the plaintiff must establish in the second suit, 1. The contract or relation on which the liability over depends; 2. A prior action for a cause for which that contract or relation makes the defendant liable over; 3. A notice to the defendant to appear and defend the former action, and 4. The recovery of damages. On these points there is no legal presumption, but they must all be strictly proved.⁹ Thus where one obstructed the street by placing therein a pile of earth, stones and gravel, so

⁷ *Lowell v. R. R.*, 23 Pick., 32.

⁸ *Littleton v. Richardson*, 34 N. H., 187, and cases cited.

⁹ *Ibid*, 188..

that another person riding in a carriage was thereby injured, and the injured party recovered double damages against the city, it was held that the individual causing the nuisance was liable to the city, though not for double but single damages, since the double damages in part rested on the ground that the city was guilty of a degree of negligence, though less than that of the party obstructing the street.¹⁰

SEC. 133. The negative offense of neglecting repairs is another ground. But if the negligence is that of an occupying tenant, it is held that he and not the owner is liable over to the city; as, for example, where the injury results from a defect in the sidewalk, occasioned by the want of repairing a cellar way constructed in the sidewalk. However, if by the lease the repairing was the duty of the owner, he would be liable over and not the tenant. But *prima facie* the duty of repairs devolves on the occupier, as between himself and the public, and he will be held liable except in the case of an express agreement for repairs by the landlord—in which case the latter, to avoid circuity of action, may be held primarily liable to the injured party, and *per consequentia* to the city.¹¹

SEC. 134. But where an owner leased the lower story of his building for shops, and also portions of the upper stories for various purposes, including one or two rooms to the municipal corporation itself, and retained the residue in his own possession, he was held responsible for the safety of an awning along the whole front of the building for the benefit of the shops, there being no express agreement to the contrary with the tenants. And in such case, if the awning falls, and the city is compelled to pay damages to one injured by the fall of it, he will be held answerable to the city, and the occupants of the shops need not be joined as defendants. And a notice to him of the action brought against the city, which informs him that an action has been brought to recover damages for an injury sustained “on the sidewalk in front of the building,” designating it, and requesting him to defend the

¹⁰ *Lowell v. Short*, 4 Cush., 275.

¹¹ *Lowell v. Spaulding*, 4 Cush., 277

same, and stating that if the city was liable he was responsible to it, because the injury, if it occurred, must have occurred through his negligence, is sufficiently definite to charge him with the result. And the verdict and judgment against the city are conclusive against him, in the second action, of the existence of the defect, the fact of the injury, the absence of negligence of the injured party, and the amount of damages.¹²

And in such a case, therefore, it is not competent for the defendant, in the second action, to set up as a defense that the awning did not fall of its own insufficiency, but from a sudden and extraordinary fall of snow thereon, in order to disprove his own negligence, this being an issue in the first case, and concluded therefore by the first judgment.¹³

SEC. 135. As to *representation*, in connection with municipal and political corporations, it has been held in New York that where a party is assessed for a local improvement, and brings an action to enjoin the municipality from proceeding to collect the assessment, and obtains a decree, this decree does not prevent another person, not a party to the first action, from maintaining another similar one for the same purpose. For such an action is not like a *certiorari* bringing up the entire assessment roll for a review in behalf of all parties subject to the assessment—in which case the judgment of the court would be on the whole record, and might annul the entire assessment. Yet the first decision would operate on the principle of *stare decisis*—as the rule of the court until reversed on good cause.¹⁴

SEC. 136. In Iowa it has been held as to a county—and the same principle would apply to a city—that if a judgment is obtained against the county or its legal representatives, in a matter of general interest, such as the assessment or collection of a tax, it is binding on all the citizens individually, as well as upon the county, or its officers named as parties on the rec-

¹² *Inhabitants of Milford v. Holbrook*, 9 Allen, 21.

¹³ *Zink v. Buffalo*, 6 Hun., 612.

ord. In a case involving this matter, the declaration averred (on petition for a *certiorari*) that the plaintiff was the owner of certain lands in the said county which had been assessed for taxation; that the defendants were the board of supervisors of the county; that certain bonds had been issued without authority of law, as subscriptions to the capital stock of a certain railroad company; that afterward certain judgments had been obtained on said bonds or coupons by persons unknown to the plaintiff; that the plaintiff was not a party to the suits nor entitled to defend therein; that a tax had been levied to pay the said judgments; that such subscription was in violation of law, the bonds were void and the attempt at taxation illegal and unconstitutional; and, that these taxes had been enjoined. The defendants answered setting up the judgments on the bonds, and then averring that the plaintiff was a citizen of the county when the judgments were rendered, etc., and that the injunction set up had been adjudged as void for want of the proper parties, as an issue in the suits on the bonds. The *certiorari* was refused.¹⁴ The opinion of the court is quite elaborate and important, and not without a dissenting voice. I therefore feel justifiable in quoting it at length.

The court say, per WRIGHT, J.: "In view of the prior decisions of this court, there remains, in my opinion, but one question for our determination, and that is, whether plaintiff was barred of his rights as a judgment plaintiff by proceedings on the part of third persons against the judgment defendants, in another tribunal; and, to which proceedings he was not a party by name. It seems to me that as to all other matters and questions we are concluded by the expressed adjudication of the Federal courts in these 'county or railroad bond cases,' as well as by long settled rules recognized by other courts, and by none more clearly than by this, in the recent case of *Ex parte Holman*, 28 Ia., 88. What, then, is the question before us? I answer, just this: Were the rights of plaintiff under the Berryhill judgment [of injunction adduced

¹⁴ *Clark v. Wolf*, 29 Iowa, 197.

in the pleadings] cut off by the order or judgment of the United States Circuit Court for Iowa ordering the recovery and levy of the tax, to which the county and its officers were made parties, and of which they had notice, but of which the plaintiff had no notice, and to which he was not a party otherwise than as a citizen of the county, and as he might be bound in virtue of such relation? I confess that, at first, upon the arguments, I was impressed by the plausibility, at least, if not entire soundness of plaintiff's position. For the general proposition was incontrovertible that a judgment *plaintiff* shall not be concluded by proceedings on the part of third persons against the judgment *defendant* in relation to said judgment, to which plaintiff was not a party. And hence the process of reasoning seemed to be plain enough, as follows: Plaintiff was a party to the Berryhill judgment; the county and its officers were defendants; their interests were hostile and adverse; a proceeding against the county and its officers adjudging that judgment void, or of no validity as against a proceeding by the bondholders for the levy of a tax, certainly ought not to bind plaintiff; for, if so, then it would occur, in the face of the rule just stated, that, as plaintiff, he would be concluded by the actions of third persons against the defendants whose interests and relations to the controversy were adverse to his. Further reflection, however, led me to distrust the correctness of the first impression, and I am now forced to believe that plaintiff is not in position to claim the benfit of the rule stated.

"I concede—indeed, I do not understand it to be seriously controverted—that plaintiff is entitled to the rights and benefits of the Berryhill judgment. I think it is as well settled that plaintiff, as a *citizen* of the county, is bound by a judgment against the county, in a court having jurisdiction; or, against the board of supervisors, they being the legal representatives or agents of the county. If this is so, then, if by the action of the federal court against the county and its officers, the *citizens* of the county (including plaintiff) are

concluded, I confess that I do not see what *plaintiff's* rights as a party to the Berryhill judgment are worth. In other words, the difference in law, and for any purpose either practical or beneficial between plaintiff in his capacity as a *citizen* and as a *party* to the injunction judgment, I cannot appreciate. He has no right, and can claim none to the Berryhill decree, except in virtue of his capacity as a *citizen*; for, only in this way, and through this channel, is he a party to it; he is not so by name, but as it was brought by Berryhill for himself and others, citizens of the county, and the question was one of common interest, all the *citizens* are treated and accepted in theory as parties, and standing as Berryhill does. Now, when these same *citizens* are concluded by a proceeding against the county, the municipality and its officers, what rights have they left under their judgment? If parties to the second or federal judgment, or adjudication, where is the warrant for saying that they are concluded as to certain matters, or in certain capacities, and not as to, or in, others? The effect of the adjudication against the county cannot, in my opinion, be thus divided up. Let us look at the matter a little more at length, in the light of reason and principle. Had the county the power to contract the debt upon which the federal judgment was rendered? I say, as I have from my place here repeatedly, for the last twelve years, no; none under the statute, none inherently. This we know has been held over and over again by this court.

“But, suppose a tribunal having jurisdiction determines in a case before it that the bonds are valid, and renders judgment accordingly; that from this judgment there is no appeal, and that it remains in full force, in no manner disturbed or set aside. Suppose, further, that the county should obtain an injunction, and have it made perpetual, against the collection of these bonds. In this action in the other jurisdiction, this injunction proceeding is pleaded in bar, but is expressly held to be no defense, and this order or judgment remains undisturbed. Now a majority of this court, in the case of *Ex parte*

Holman supra, held, under just these facts, that the supervisors could not resist a process commanding the levy of a tax to pay such judgment. It will be observed that then, as now, I, at least, placed stress upon the fact that *the injunction proceedings were pleaded and held not to be a bar*. I have not yet been called upon to determine the effect of such judgment as against an injunction not pleaded. Nor, further, am I conscious of ever having held anything which could be construed as abridging, in any manner, the power of the state courts to exercise their rightful and constitutional jurisdiction both to render and enforce their own judgments. The rule is mutual and reciprocal that while the state courts may not interfere with the process of the federal courts, neither shall the federal courts with those of the state. The power of each, however, to enforce its own is in no manner disturbed by the rule above recognized. And yet it by no means follows, in my opinion, as suggested by counsel, that the federal process is so omnipotent and all protecting that the officer thereunder can, without interference by the state, take the property of A when the writ was against the property of B; nor, does it follow, either, that when property has come to A by the judgment of a state court he can be divested of that property by the judgment of the federal court to which he was not a party. The protection offered to the party holding adverse to the federal process in no just or proper sense interferes with the jurisdiction of the federal courts. In the case referred to, *Ex parte Holman, supra*, the holding was upon the plain ground that the second adjudication concluded the county as to the effect of the injunction upon the rights of the creditors, and that its correctness could not thus be inquired into collaterally. What better, then, is plaintiff's situation, under the same or similar facts? It is said that the questions between the creditor and the corporation (municipal) as the case now stands, is one of legal liability, but that as between the county (corporation) or its officers and the citizen it is one touching the power and extent of taxation under legislative grant. I say, if this be the argument, then it would be equally true without the aid of the

injunction proceeding. For this assumes that the citizen is not bound by a recovery against the county, but that when his property is seized to pay taxes he may question the power of the county to contract the debt upon which the recovery was had; and this, it will be seen, is directly in the face of a most important proposition above stated, to-wit: That the judgment in the Circuit Court of the United States against the supervisors as plaintiff's agents (treating now of his rights as a *citizen* only) bound him; and as to the correctness of this, there can be but little doubt. It must be, in the absence of fraud or collusion, or the like, on the part of the municipal officers, that the legal liability of the county being once fixed by a valid judgment, the citizen no more than the county can afterward resist the collection of said judgment upon the ground of a want of power to contract the debt; that stage in the controversy is past. If the officers shall attempt to make a levy not warranted by law (for instance, a greater per cent than the law allows), or to collect the same in an illegal manner, or the like, these are questions between the citizen and the corporation, and do not touch either the validity of the debt, or the correctness of the judgment which is intended to be satisfied. The distinction is, to my mind, very clear; plaintiff's case is not within that last supposed. And here let it be remembered that this argument is predicated upon the *binding force* of the recovery *against the county* in the federal court. The liability of the county and the obligation to meet the same is, in such a view, as well *settled* as though the original debt was of the highest morality founded upon the most undoubted consideration, and contracted under the clearest grant of legislative power."

"It is conceded that plaintiff's property cannot be *levied upon* to pay this or any other debt of the county (Rev., § 3274), but he is liable, like every other citizen, to pay his taxes to carry on the affairs of the county, and meet its burdens. The debt in controversy, it has been adjudged, is one of these burdens. If it had not been so adjudged, plaintiff would occupy a very different position; but it has, and there

is the great difficulty in plaintiff's case. This course of reasoning, then, brings us back, necessarily, as it seems to me, to plaintiff's rights under the *judgment* in the injunction suit, after the adjudication against the county, holding it insufficient in the Circuit Court of the United States. And here let it be conceded, as claimed, that the levy is made in defiance of the injunction of a court of competent jurisdiction. But what else is true? Just this: That one other tribunal, having the power to do so as against the county, as we have seen, in a case before it involving the force, effect and conclusiveness of that injunction, and in which it was pleaded, has held that the levy should and must be made, thus removing it out of the way. Where does plaintiff stand then? Just here: That as a *party deriving rights under this judgment* he was not a party to or bound by this order declaring the injunction no impediment, however much bound as a citizen. It is granted that a judgment against A, as administrator of the estate of B, does not conclude A as an individual; nor would a recovery against him as an individual conclude the estate of his ward for whom he was acting as guardian. But a judgment in the first place, if *bona fide*, would bind the property of the estate, and the heirs interested therein, and so it would his ward, if the action was against him as guardian. So, too, as we have seen, is the citizen bound by a judgment against the county; this was as true of Berryhill as of any other citizen. But suppose he had been made a party by name to the proceedings for *mandamus*, being joined with the county, could he now say I was joined to conclude me as a *citizen*, but not as a party to the judgment which I obtained enjoining the collection of these bonds? And would the answer to the proposition be any different whether he did or did not set up and rely upon the judgment? If he did, and it was held insufficient, he is concluded; if he did not, he is equally so, for he had his day in court, and it was his duty to make known his defense, and failing to do so he shall not afterward be heard. Now if the county, his representative, his agent, in the same manner is concluded, is not he also? And if he, then is the

plaintiff who claims under the same judgment and as effectually as though a party by name to the proceedings in the federal court? I view the case precisely as though the plaintiff was a party to the proceeding in the federal court against the county. And this because the county—there being no suggestion of fraud or collusion between the judgment creditors and the county—must be treated as plaintiff's agent or representative, and whatever binds the county binds plaintiff as to any and all defenses which he then held, and failed in person or by his representative to set up. My conclusion, therefore, is that the judgment of the court below is in harmony with well-settled principles, and should be affirmed." In which the majority concurred.

But I think it due to the subject to give, on the other side, the vigorous dissent of BECK, J., who said:

"I cannot concur in the opinion just read. As I understand the record, the injunction proceeding was instituted before the actions upon the coupons were commenced in the federal court. The subject matter involved in the injunction suit, and the actions upon the coupons is the same, and of it the federal and state courts may have concurrent jurisdiction. But the state court, having first acquired jurisdiction, the federal court was excluded therefrom. The judgments of the federal court upon the coupons, being without jurisdiction, are void, and all process to enforce them, or ancillary proceedings in and of them, are void.

"It is evident that a void judgment will not support process of execution nor any ancillary proceeding. The *mandamus* proceeding being based upon a void judgment—upon no judgment—is void, and the peremptory writ should not be obeyed. The tax, therefore, should not have been levied. Having been levied without authority, plaintiff, as a tax payer, is entitled to relief from this court by a proper order in this proceeding setting aside the levy of the tax. * * *

"If the Supreme Court of the state of Iowa, in a case where it indisputably possesses jurisdiction, construes the constitution and laws of the state, I know of no principle of law which

will permit the federal court, in a subsequent case involving the identical subject matter, to disregard and annul the prior decision of the state court, and coerce the people and their officers to do that which the constitution and laws of the state prohibit. This is the very thing that the federal court is now doing, in these cases, to enforce the payment of municipal railroad bonds, and their power so to do is admitted by the majority of this court. That it may be done rightfully is contrary to both principle and precedent; that it in fact is done, most clearly establishes that a judicial revolution in our government, whereby the federal courts will become the final interpreters of state constitutions and state laws, is imminent, if not accomplished. The effect of this revolution — while its only fruits may be the enforcement of the payment of a few millions of dollars of municipal railroad bonds — are of little moment. But ‘revolutions never go backward,’ and time will demonstrate that unless the progress of this judicial revolution be stayed by proper congressional action, the states will soon cease to control their own internal affairs.”

CHAPTER XI.

PARTIES TO PROMISSORY NOTES AND BILLS OF EXCHANGE.

Section 137. Notice to Indorsers — Holders — Exception.

138. Judgment for Indorsee against Maker — How it concludes him.
139. Simultaneous Actions against Promiser and Indorser.
140. Privity between Indorsee and Payee.
141. Judgment for Subsequent against Prior Indorser.
142. By an Indorser against Acceptor.
143. Transfer of Property under Acceptances — Consideration.
144. Judgment on Promissory Note merges the note.
145. Defense of Payment—Conclusiveness of Judgment thereon.

SECTION 137. In some cases parties to promissory notes are parties answerable over. But there is a sufficient distinction between these and other parties of this kind already noticed, to justify, if not require, a separate treatment of the subject in relation to the parties to negotiable instruments and their obligations to each other. Under commercial law the rule is that every one whose name is on a bill or note is entitled to previous notice in order to charge him on the non-payment thereof, when he may have recourse against some other person.¹ The holder of the bill being an agent merely is not considered a party to it. As, for instance, if a bank receives a bill for collection, and neglects demand or notice, it is responsible merely for the damages sustained, to be determined by a jury. Here, until collection is made, the risk is in the drawer, and

¹ *Allen v. King*, 4 McLean, 131.

where there is a failure the holder, considered as an agent, is held accountable for the damages actually suffered; and if no damages are really suffered by reason of any omission, it is held that the drawer or indorser is not discharged thereby — as an omission to make demand or give notice of non-payment or non-acceptance. True, where there has been any omission damages are presumed, and can only be rebutted by proving a want of effects in the hands of the drawee continually from the date of the draft until after it was due, and this under such circumstances as to amount to notice to the drawer that he has no right to expect the payment of the bill. Where one who is not merely an agent, however, but an actual party to the bill, neglects to give notice to an indorser of non-payment, the indorser is discharged.

One who receives a bill to be collected, the proceeds to be applied on the payment of a debt due him, is not considered as a mere collection agent, but as a party to the bill, because of the actual interest he has in it. Neither the drawer or indorser has any right to withdraw the bill to his prejudice, nor take any other steps in regard to it against his interest. He has a right to dispose of it, and he has a right of recourse against the indorser. But if he fails to give notice, the indorser will be discharged by his negligence, and he can only enforce it against the drawer.²

SEC. 138. Where an indorsee obtains a judgment against the maker of a negotiable promissory note, payable on demand, this is conclusive against the defendant as to the fact of indebtedness and the amount thereof, and he cannot afterward, as administrator of the payee's estate, maintain a suit against the indorsee (plaintiff) to recover the value of the note on the ground that he was a creditor of the payee, and that the transfer by the payee to the indorsee was fraudulent and void against him as such creditor, if there are no other creditors of the payee, the former judgment being held conclusive that the note was not subject to any equitable set-off.³

² *Ibid passim*; *Commercial Bank v. Hughes*, 17 Wend., 101.

³ *Flint v. Bodge*, 10 Allen, 130.

SEC. 139. An indorsee of a promissory note may, it has been held, maintain simultaneous actions against the promiser and the indorser. But if he does so, he can only have one satisfaction; and if judgment is obtained and paid, it was held, in an early case in Massachusetts, he could not maintain the other action for the costs.⁴ But it would seem to be against the weight of authority.⁵

SEC. 140. There is such a privity between an indorsee and a payee of a note that where the former sues the maker and a verdict is rendered on the merits for the defendant it constitutes a bar to another action by the payee.⁶

SEC. 141. Where a judgment is rendered against an indorser, and he pays the judgment, and then sues a prior indorser, a previous judgment in favor of a subsequent holder and for or against the prior indorsers will not debar him from prosecuting his action, or even be admissible evidence therein because of the want of privity between the plaintiffs in the two actions.⁷ In such case, of course, the second action is not on the note, but for money paid to the use of the prior indorser by the plaintiff.

SEC. 142. In an action against an acceptor, by the indorser of a draft, a former judgment in favor of the holder of the draft is not of itself evidence of presentment, demand and notice. But it is admissible, in connection with the execution issued therein, and other available proof, to show the payment of the draft after it was in judgment, by the indorser. And such payment and a possession of the draft by the plaintiff are sufficient proofs of ownership.⁸

SEC. 143. Where one purchased a quantity of wool, and gave drafts which were accepted by the plaintiffs on an agreement that they should pay the acceptances and own the wool, and that he should have the profits of manufacturing it, and then should return it to them, and afterward, by consent of both parties, the property was by him transferred to defend-

⁴ *Gilmore v. Carr*, 2 Mass., 171.

⁷ *Barker v. Cassidy*, 16 Barb., 182.

⁵ *Porter v. Ingraham*, 10 Mass., 90.

⁸ *Green v. Goings*, 7 Barb., 652.

⁶ *Levi v. McCraney*, Morris (Ia.), 91.

.. ants on their parol promise to pay the acceptances, which they failed to do, and the plaintiffs first sued the purchaser, and, the judgment being unproductive, afterward sued the defendants on their parol promise to pay the acceptances, it was held, that the recovery of the judgment against the purchaser was conclusive that he was the original purchaser and owner of the wool; that the acceptances were for his accommodation; that the transfer to defendants was a sufficient consideration for the promise of the defendants, and that they were liable thereon although it was but a verbal promise.⁹ In this case it was declared that it is not necessary a consideration ahould pass directly from one claiming the benefits of the promise, but is good if it proceed from a debtor of the promisee, and such a case was not within the statute of frauds. And it has even been held that such a consideration may be available although the creditor was not privy to it, it being made for his benefit.¹⁰

SEC. 144. Inasmuch as the judgment on a promissory note merges the note, such judgment at law will conclude the parties to it so far as to exclude a defense growing out of the relation of principal and surety existing between the defendants, previous to the rendition of the judgment; that is, as to the creditor. As between the defendants themselves, the rendition of the judgment does not change their relation. Massachusetts and Pennsylvania hold exceptions to the rule, it seems, on the ground that they have no courts with ordinary chancery powers available for the relief of sureties.¹¹

SEC. 145. Where there is a defense of payment in an action against the maker by the payee or indorsee, an indorser of the note may, although not a party and having no notice of the suit before judgment rendered, plead the judgment in a subsequent suit in the name of the same plaintiff, and against the indorser as evidence of the amount due on the note on

⁹ *Cailleux v. Hall*, 1 E. D. Smith, 5.

¹⁰ *Del. & H. Canal Co. v. Bank*, 4 Denio, 99; see *Cumberland v. Codington*, 3 John. Ch., 254; *Barker v. Bucklin*, 2 Denio, 55.

¹¹ *Marshall v. Aiken*, 25 Vt., 334.

which the judgment was rendered; and in respect to this question so adjudicated the judgment will be conclusive on the plaintiff, and parol evidence is also admissible to prove the basis of the judgment. And where an action is brought against one of two or more joint and several debtors, and it is determined therein that the note has been paid in full, such adjudication will be an effective defense in a subsequent suit brought on the same claim against the other promisor, whether original, guarantor or surety, and be conclusive on any one who was a party to the record in the first suit, although the party pleading it in the second suit was not a record party in the first suit, and had no notice of its pendency. Says the Vermont court hereon: "To illustrate the mischievous consequences which might result from the rule which would exclude such evidence as to the existence of the facts on which such judgment is founded, we may suppose a joint and several note to have been executed by six persons. An action is commenced against A, one of the signers, who defends, and prevails in his defense on the ground that the note had been paid in full by B, another signer of the note. An action is then commenced against B, who defends, and prevails in his defense on the ground that he paid the note. The holder of the note then institutes a suit against each of the other four signers separately, who respectively defend on the ground that B paid the note, and on that ground three of them prevail in their defense; but, owing to mere chance, or the death of a witness, and the rule excluding the former judgments, and each of them, as evidence, the plaintiff prevails in the other. The plaintiff has now had the advantages and chances of six trials; each signer of the note has had one trial, and there have been six judgments upon the identical subject-matter, namely: upon the defense of payment of the note in full by B before the first suit was brought; five of the judgments against the plaintiff, and one in his favor; neither of them was on grounds personal to either defendant, but each and all were upon the merits of the claim, in view of a defense which was common to all the signers of the note.

By these proceedings and their respective results the signer of the note against whom the judgment was rendered is thereby placed in a situation where it would be decided either that he had no right of action against the other signers for contribution, or that the determination of the question of judgment in their favor in the former suits was of no account, and allow them to be charged by an indirect proceeding after they had been discharged from all direct liability. It is plain, I think, that such judgments in their favor, if obtained without fraud or collusion, would discharge them from the debt indicated by the note, by reason of which, and as the consequences of applying the rule of strict mutuality of parties to a judgment as an estoppel, judgment is rendered against one of the signers, and he is without remedy against either of the others. Now, upon what principle or reason can the application of a rule stand where it gives one of the parties such extraordinary advantages over the others, as in the case above supposed? It is said that estoppels should be mutual, but it is shown by the authorities above cited that the ground of strict mutuality of parties is not universal. The rule is a technicality, and it should not be applied where it cannot stand upon some reason. In Phillips' Evidence, 327, the reason given why a verdict or judgment is not evidence against a person who was neither a party to the former suit nor claims under one of the parties is, because he had no opportunity of calling witnesses, or of cross-examining those on the other side, nor of appealing against the judgment. In the case above supposed we will assume that neither of the makers of the note was a party to the suit against either of the others, either of record or in effect by being cited in, or by actually assuming the defense. Upon this assumption, and for the reasons before stated, it seems to me that one of the makers of the note, in a suit against him, should not be estopped by the judgment against another maker of the same note, whose defense was payment, from proving the note was paid before that judgment was obtained. In such subsequent action the defendant might well insist, under the circumstances, that, as

against a party of record who sought to use such judgment as conclusive against the defense of payment interposed by one not a party to the former adjudication, the rule of strict mutuality should apply. Upon this point, however, the court express no opinion.”¹²

SEC. 146. Should the rule, then, of mutuality prevail as between joint makers of a note and the creditor, where one prevails on a defense of payment, and afterward suit is brought against the other? On this, the same court says further:¹³ “The assumption that one of the makers of a joint and several note is a stranger merely to a judgment in favor of another maker of the same note, in an action on it where the judgment is rendered on the defense of payment in full, is contrary to the legal effect of their relation. This assumption treats the engagement of joint and several promisors as several and independent contracts, and the promisors as liable to no common duty, and as having no common rights or interests in regard to payment of the note, or defense against it when payment had been made. This is not the nature of their engagement, nor the relation created by it; but each signer of a joint and several promissory note undertakes, for himself, and as surety for the other signers, to pay the note according to its tenor. When one of the signers has paid the note in full, or made payment on it, such payment is as between the makers and payee regarded as payment made by all the makers; it constitutes a defense to the claim common to all the promisors. If action be brought against one of them, and the defense of payment is interposed, and it prevails, and judgment is rendered against the plaintiff, on the ground that the note was paid in full before the commencement of the suit, the plaintiff by such adjudication has had his day in court. The question of payment determined against him was not only a full defense for the promisor against whom that suit was instituted, but also a full discharge for the other makers from the debt indicated by the note, and the judgment as conclusive evidence of

¹² *Snencer v. Dearth*, 43 Vt., 112.

¹³ *Ibid.* 115.

such payment could not be excluded in a subsequent action against a maker of the note, though not a party of record to the former adjudication, without unjust discrimination as to the respective rights and remedy of the parties in the prosecution and defense of suit or suits upon such a contract. *

* * * * * And if he [the creditor] proceed to trial and final judgment, in a suit against one or more of the makers of the note, and not against all, upon the defense of payment, or other defense to the merits, that would discharge the claim as to all the promisors, we may assume, until it be shown that he has just cause for a new trial in the same action, that he has had such a trial and adjudication of the matters involved as the law contemplates, co-extensive with the rights accorded to the party against whom he sought to enforce the claim. In such trial and adjudication upon matter of defense to the whole merits of the plaintiff's claim, such as payment of the note in full, and final judgment is against the plaintiff, such judgment is not on grounds personal to the maker of the note the plaintiff had elected to sue, but it is also in effect on the ground that he has no cause of action against the other makers of the note, or either of them. And if such judgment be not held as conclusive evidence against the other maker or makers of the note, where the identical matter adjudicated in the former suit is involved in the latter, it would follow that the payee or indorsee of such note could have as many opportunities to litigate such matters as there were makers of the note, and in all this the latter would have but one opportunity to make defense, for they all constitute only one of the contracting parties. This objection is not obviated by the fact that in separate suits each maker of the note in the suit against him has his day in court, and the benefit of a trial. A rule that would not allow a judgment in favor of one of the makers of the note upon such defense as a legal bar to the recovery against another maker of the same note, would compel each maker of the note in a suit subsequently tried against him to litigate the same question or questions which had been adjudicated in the former suit or suits, irrespective of the

former adjudication and its results, by which the plaintiff would have the advantage of two or more trials in different suits of the same matter, and if he should finally prevail against one of such makers he would have had only one trial and judgment upon the matters involved." The court further proceeds to argue the proposition at length, on the ground that the maker against whom the plaintiff at length prevails, after failing as against the others, would be perhaps deprived of all claim of indemnity against his co-debtors. Also, the court maintains the same doctrine as to effect, and says: "Where one of the makers, in a suit against him, upon the defense of part payment or offset of a claim in his favor, has reduced the amount of the note, another maker of it, in a subsequent suit can legally claim that the plaintiff should be bound by the former adjudication, as showing the balance due upon the note at that time. Such claim being mutual as between the parties to the first suit would not be so between those in the second, and for this reason the merits of it could not be litigated as an offset between the latter. This is one of the reasons for holding the former judgment upon such matter conclusive. The claim is by the former adjudication merged in the judgment, and thereafter no action will lie upon it. Hence, it would not do to say that the plaintiff, in a suit on the note against another maker, could collect of him that part of the note which had been satisfied by offset of the claim against the plaintiff. To allow him to do this would allow him in the first suit, by offset to the note, to pay and satisfy a debt due from himself to one maker of the note, and in the second to collect the whole note of another maker thereof. It can make no difference that the claim in offset was originally a matter personal between the parties to the first suit, because by its adjudication and offset the effect is the same as if the defendant in the first suit, before its commencement, had made a payment from his own private funds to apply on the note, and the same had been allowed in assessing the damages. Upon the same principle, where judgment is rendered against the plaintiff in a suit in his favor against one of the makers

of the note, and the ground on which the plaintiff failed to recover is that the note had been paid in full, or satisfied by offset of a claim due from the plaintiff to the defendant, such judgment should be regarded as a legal bar to a recovery against either of the other makers, though not a party to the former adjudication. To this extent, effect should be given to the judgment in view of the privity existing between the promisors, and in view of the fact of such payment or offset determined by the judgment. In such case, after the question of payment or other matter in full satisfaction of the note has been once determined by such judgment against the plaintiff, there can be no foundation for a suit against any other maker of the note. If a maker of the note who was not a party to the former suit would not for that and other reasons be bound by the judgment, if it had been the other way, there can be no good reason why the judgment should not be conclusive of the matter determined as against the payee who was a party to the former adjudication."

CHAPTER XII.

GARNISHEES.

Section 147. Garnishment as a Bar.

- 148. Defaults in Pleading.
- 149. Garnishment under Stay Laws.
- 150. Reversible Judgment may Protect.
- 151. Creditor of Garnishee, how far Concluded.
- 152. Wrongful Payment by Garnishee.
- 153. Judgment without Satisfaction.
- 154. Suspended Garnishment Judgment.
- 155. Plea in Abatement.
- 156. Assignment of Note and Notice.
- 157. Entirety — Principal Paying Part.
- 158. Valid Judgment Protects.
- 159. But not Invalid.
- 160. Necessity of Prior Final Judgment.
- 161. Non-resident Debtor.
- 162. Duty of Garnishee as to Prior Judgment.
- 163. General Rule therein.
- 164. Position of Garnishee.
- 165. Property in Plaintiff's own Hands.
- 166. Default at First Term not Fatal.
- 167. Issue of Fraud.
- 168. Diligence Required of Garnishee in the Action.

SECTION 147. An adjudication in garnishment does not always of necessity avail to bar a subsequent action against the principal debtor, even if the matter is the same. It is expressly so provided by statute in Vermont.¹

¹ *Laport v. Bacon*, 48 Vt., 180.

SEC. 148. And if the maker of a note has been garnished as a debtor of the payee, and admits in his answer an indebtedness of less than the actual amount due, and fails to set forth the fact that an action is pending against him by an assignee of the note, and allows judgment against him on his answer, when he could successfully have defended himself on account of the laches of the attaching creditor, and then pays the garnishment judgment in full, this satisfaction of the judgment will not be available as a defense to the action on the note brought by the assignee thereof.²

SEC. 149. Where one had a judgment against an insurance company, on which execution could not be issued under the stay law, and meanwhile the company was garnished, although execution had previously been taken out by the plaintiff in disregard of the provisions of the stay law, it was held that the garnishment must prevail, notwithstanding a subsequent reognition of the execution and payment of the judgment by the company. The court said: "The whole question, therefore, was, and is, was Gamble entitled to the benefit of the open legal diligence disclosed in running his garnishment, or could it be defeated by the procurement and recognition of an immature and illegal execution which was discharged subsequent to the garnishment? The law would, indeed, be but too justly subject to the reproach of being a farce, could its principles and provisions be thus evaded or trifled with."³

SEC. 150. Although a judgment against a garnishee may be reversible for error, yet if no appeal is actually taken upon it, the garnishee may avail himself of it, in a subsequent suit against him by his original creditor, as a set-off to the amount of the payment he has made on it.⁴ And on like principle, a garnishee under a valid adjudication, who can be reached by execution issued in pursuance of that adjudication, cannot be put to the peril of insuring the regularity of the execution when called on for its satisfaction, or else of losing the protec-

² *Kimbrough v. Davis*, 34 Ala., 590.

³ *Insurance Co. v. Gamble*, 14 Mo., 409.

⁴ *Dole v. Boutwell*, 1 Allen, 287.

tion which such satisfaction ordinarily yields to the party making it, as, for instance, where the statute requires a recognizance for a review to be filed before execution can issue on a judgment against an absent defendant, and yet execution is issued against the garnishee in such case without such previous filing in the original case against the principal absent debtor.⁵

SEC. 151. A judgment against the garnishee is conclusive against his creditor as to the amount paid on the judgment against the creditor in favor of the garnisher, but it is not conclusive as to the whole amount of his indebtedness to the creditor, because that is not an issue in the garnishment proceeding properly.⁶

SEC. 152. In Massachusetts, a payment by a garnishee in a foreign attachment made after the expiration of thirty days after final judgment without the issuing of an execution, and after the principal defendant (his original creditor) has sued him for the amount, will not avail him as a defense in the pending suit by his immediate creditor,⁷ this payment being held to have been "in his own wrong," under such circumstances, as the statute expressly provides that "if after one has been adjudged trustee, the effects are not demanded of him by force of the execution within thirty days after final judgment, the same effects shall be liable to another attachment, and if no such second attachment is made, the principal defendant may recover the effects."⁸

SEC. 153. As a matter of course, the garnishment judgment must be satisfied in order to bar further proceedings by the plaintiff against the creditor of the garnishee, or to an action by the creditor against him.⁹ And even if the creditor's suit was commenced previously, it may be defeated by garnishment process, and payment on execution will be a bar to the action, if pleaded.¹⁰

⁵ *Stearns v. Wisley*, 30 Vt., 664.

⁸ *Wise v. Hilton*, 4 Greenl., 438.

⁶ *Brown v. Dudley*, 33 N. H., 515.

⁹ *Killsa v. Lermond*, 6 Greenl., 117.

⁷ *Burnap v. Campbell*, 6 Gray, 241.

The State of Maine, however, holds an exception as to the rule of satisfaction, the judgment being a good bar without proof of satisfaction;¹⁰ and also Massachusetts.¹¹ In Texas it is held that a judgment without satisfaction is not a complete defense *pro tanto*, yet the judgment may be pleaded in a suit by the immediate creditor in order to be protected against paying the same debt twice.¹²

In Georgia it is held that a garnishment judgment cannot be pleaded in bar to a suit by the assignee of the note on which garnishment is made, although the transfer of the note was made after the service of the garnishment process.¹³

SEC. 154. And in Massachusetts it has been held that the judgment must be a living one, so that if the plaintiff in the garnishment has, by neglecting to comply with the local laws, put his judgment in a state of suspension, and it cannot be revived by *scire facias*, it cannot be pleaded in bar of an action by the immediate creditor against the garnishee for the debt.¹⁴

SEC. 155. In Maryland a pending suit in attachment may be pleaded in abatement to a suit against the garnishee by the defendant in attachment, but to constitute a bar there must be a judgment followed by execution executed, or payment, or satisfaction. This is under an express statute, however.¹⁵

SEC. 156. In some states it is provided by statute that, in order to protect a negotiable promissory note from garnishment when it has been assigned, the maker must be notified of the assignment before the issuing of garnishment process. In such a case the assignment will be an effectual defense in the garnishment proceeding. Yet even if this defense should prove unavailing, and judgment is rendered against the garnishee, this does not debar the assignee from collecting if he took it before maturity.¹⁶ Nor does payment of the judgment

¹⁰ *Mathews v. Houghton*, 2 Fairf., 381; *McAllister v. Brooks*, 22 Me., 84.

¹¹ *Perkins v. Parker*, 1 Mass., 117; *Stevens v. Gaylord*, 11 Mass., 265.

¹² *Farmer v. Simpson*, 6 Tex., 308.

¹³ *Brannon v. Noble*, 8 Ga., 549.

¹⁴ *Flower v. Packer*, 3 Mason C. C., 250.

¹⁵ *Brown v. Somerville*, 8 Md., 455.

¹⁶ *Gates v. Kerby*, 13 Mo., 157.

debar him. He cannot sue the garnishment creditor for the money paid, however. His remedy is against the garnishee, who is liable to pay the debt again to him, and that even if the attaching creditor had knowledge or notice himself of the assignment during the pendency of his action.¹⁷

SEC. 157. In Maine it has been held that if, after the rendition of a judgment in garnishment, the principal debtor pays a part of the claim, and thus releases the garnishee from a portion of his liability, he may afterward sue for the amount so paid, provided he will release further claim upon the garnishee. In such a case the court said: "There is a difficulty, however, in allowing the principal to pay a part of his debt, relieve the trustee from his liability as to that part, and then bring a suit for it, and thus continue to divide one debt into several parts, and bring several suits. The defendant might, in this case, have avoided such a result by an immediate payment of the amount due from him, and this it was his duty to have done after he was adjudged trustee. The plaintiff has offered to release any further claim against the defendant, and if that be done the objection to a multiplicity of suits will be avoided, and there will be no just cause for setting aside the verdict on that account."¹⁸

SEC. 158. In all cases, if the judgment against the garnishee is valid for the purpose of compelling payment from him, it is valid as a protection against a repetition of the demand for it.¹⁹

SEC. 159. A judgment against a garnishee in a foreign attachment begun after the death of the principal defendant, and payment of the amount of it on execution, does not bar a suit against him by an administrator of the deceased, because the garnishment judgment in such a case is invalid.²⁰

SEC. 160. In all cases (except attachments) there must first be a judgment against the principal debtor before a garnish-

¹⁷ *Funkhouser v. How*, 24 Mo., 44.

¹⁸ *Norris v. Hall*, 18 Me., 335.

¹⁹ *Anderson v. Young's Exr's*, 21 Pa. St., 448.

²⁰ *Loring v. Folger*, 7 Gray, 507.

ment proceeding can be instituted against his debtor, and hence, where, in an action on a promissory note, the maker sets up as a defense a prior garnishment as a debtor of the payee of the note, he must show that final judgment was rendered against the payee of the note in the suit in which he was garnished.²¹

SEC. 161. A non-resident debtor coming into the state for a temporary purpose is not, I believe, generally held liable to be garnished.²²

SEC. 162. The question arises, how far is a garnishee chargeable with the duty of testing the validity of the first judgment against his immediate creditor, under which judgment he has been summoned to answer as a debtor by the garnishment proceeding. The first point hereon is, that it is usually held that he must be compelled to pay by *due process of law* in order to discharge him from the original debt; and so where the proceedings were irregular, and the security was not given by the plaintiff which the statute required, the court held it was not in due course of law, and the payment availed nothing;²³ for if a garnishee pay without a statutory bond being given by the plaintiff, it is regarded as a mere voluntary payment which constitutes no defense to a subsequent action.²⁴ Hence, also, a garnishee is held to be obliged to see that the court had jurisdiction of the person of the principal debtor, so that the writ should issue from the proper county.²⁵ And, in Illinois, it has even been held that a garnishee must inquire into the legality and also the regularity of the previous proceedings against a defendant, in attachment, because if such proceedings were irregular and void he would be liable to pay again to his immediate creditor. Yet the court seems to modify this declaration so as to confine the necessary inquiry to such irregularities as will render the

²¹ *Barton v. Smith*, 7 Ia., 85.

²² *Baxter v. Vincent*, 6 Vt., 614.

²³ *Myers v. Urich*, 1 Binn. (Pa.), 26.

²⁴ *Grissom v. Reynolds*, 1 How. (Miss.), 570; *Ford v. Hurd*, 4 S. & M., 683.

²⁵ *Robertson v. Roberts*, 1 A. K. Marsh, 249.

judgment void, and not to extend it to such as would be ground for reversal on appeal; that is to say, it should regard only fatal irregularities of jurisdiction,²⁶ which is doubtless the usual rule. It is so declared in Indiana.²⁷

Where execution even has been issued, after notice of a transfer prior to the service of the garnishment writ, although the notice was not given to the garnishee before judgment, it is held in Mississippi that a payment thereon will not protect the garnishee, whose duty it is thereon to invoke the aid of a court of equity by a bill of interpleader, and, failing in this, he is held chargeable to the assignee, notwithstanding his payment of the judgment rendered against him under the pressure of an execution actually issued and enforced.²⁸

But, in Massachusetts, it has been held that if a garnishee has judgment rendered against him which is erroneous, and he does not appeal, the judgment cannot be impeached in a subsequent suit against him by his creditor, and that, therefore, it may be urged as a bar to the action.²⁹ And he is under obligation only to see that the former judgment against his creditor is regular on its face, so far as not to render it invalid, in order that his payment of the garnishment judgment against him may avail for his protection.³⁰

In New Jersey it is held that if there is a judgment against the defendant, the garnishee on *scire facias* cannot inquire into the legality or regularity of the proceedings, if the court is one of competent jurisdiction; so that if it is not recited in the writ of *scire facias* that the defendant was three times called in open court and made default, or that the original writ was served in a particular manner, or that notice of its being issued had been duly published, no objection to such omission can be made by the garnishee, neither of these matters being essential to his protection. The judgment of the

²⁶ *Pierce v. Coulton*, 12 Ill., 363.

²⁷ *Richardson v. Hickman*, 22 Ind., 246.

²⁸ *Oldham v. Ledbetter*, 1 How., 48.

²⁹ *Webster v. Lowell*, 2 Allen, 123.

³⁰ *Morrison v. New Bedford Sav etc.*, 7 Gray, 270.

court of competent jurisdiction is conclusive on him, and is a complete protection for him.³¹ So, in Massachusetts, a garnishee needs to make no inquiry as to service beyond the return of the officer; so that if, upon the face of this return, there appears to have been proper service, and there is no other objection to the validity of the proceedings, he will be protected,³² although if he has had a day in court and is guilty of laches in interposing any available plea, he will not be discharged.³³ And if there has manifestly been no sufficient service against the defendant, the garnishee may, and therefore ought, to set this matter up as a defense in the garnishment suit.³⁴

SEC. 163. The general rule is well stated by the Indiana court in an early case: "A garnishee in attachment is not bound to superintend a defense for the principal debtor, and is not answerable for such defects and irregularities in the proceedings as relate only to the mutual rights of the original parties to the attachment suit, but he should know that the proceedings against himself are valid, and such as he is legally compelled to obey; for otherwise such proceedings, being in their nature *ex parte*, so far as the attachment debtor is concerned, are no evidence of any request, either express or implied, on the part of the latter. A voluntary payment of money in discharge of the debt of another, unless made at the party's request or direction, will not bind the party for whom the debt is paid. To constitute a valid claim against the latter the payment must be for some legal demand which could not be resisted."³⁵

SEC. 164. The position of a garnishee may be regarded as that of a mere stakeholder bound to see that the funds or property in his hands are not withdrawn without regular execution and the giving of security for their being refunded

³¹ *Lomerson v. Hoffman*, 4 Zabr., 676.

³² *Wheeler v. Aldrich*, 13 Gray, 52.

³³ *Thayer v. Taylor*, 10 Gray. 169.

³⁴ *Pratt v. Cunliff*, 9 Allen, 91.

³⁵ *Harmon v. Birchard*, 8 Blkf., 419.

according to law. The question at issue between him and the plaintiff is whether he has property belonging to the defendant, and except as to void judgments against the latter, he cannot dispute properly the issue between the plaintiff and defendant themselves.³⁶

SEC. 165. But what is the position of one who is his own garnishee, having property of the defendant in his own hands? The Pennsylvania court answers the question thus: "Some doubts are to be found in the ancient English authorities as to the right of a person to lay a foreign attachment on property in his own hands, under the customs of London, and other places, but the weight of authority is that it may be done, and precedents of the mode of pleading in such cases may be seen in Coke's Entries, 139b, and Rastell's Entries Dette, 156b. That such proceeding is maintainable, under an act of assembly, was determined in *Graigle v. Natnagel*, 1 Pet. R., 245. So far as it is a legal remedy against an absent debtor for the purpose of compelling an appearance, or securing a priority, it ought to be allowed, because the plaintiff would otherwise be excluded from a right enjoyed by every other creditor. But the operation of the judgment is very different where the plaintiff is a third person, and where he proceeds against funds in his own hands. In the former case, the proceeding is adverse; the garnishee cannot contest the plaintiff's debt; the judgment against the defendant in the attachment is evidence of the existence of the debt for which it is regularly rendered, though it may be controverted by proof of fraud or collusion. To oblige the garnishee, when defending himself against the suit of his creditor, to prove the debt of the plaintiff in the attachment which he could not dispute, and of which he may be wholly ignorant, would be unjust and would subvert the system. The only question at issue between the garnishee and the plaintiff in the attachment, is, whether the garnishee had in his hands property of the defendant. The security of the defendant consists in the bail given by the plaintiff for

³⁶ *Moyer v. Lobengeir*, 4 Watts, 391.

returning the property attached, if, within a year and a day, the defendant appears and disproves the debt. In a word, the garnishee is a mere stake-holder, bound to see that the effects are not taken out of his hands without regular execution, and the entry of security for their being refunded according to law. But the case is very different where the plaintiff attaches money in his own hands, and enters judgment against the defendant for a debt alleged to be due. It would be dangerous to hold that a judgment thus obtained on a proceeding to which the plaintiff himself is the only party should be even *prima facie* evidence, for it would enable a party to make evidence of a debt where none existed; whereas, if it really exists, the plaintiff is conusant of it and able to establish it by proof. If a defendant, therefore, seeks to avail himself of a prior attachment of the plaintiff's debt in his own hands, he must show the existence of the original debt on which the judgment in the foreign attachment was rendered. See the cases cited in Sey. on For. Att., 164 and *Graigle v. Notnagel*, 1 Pet. R., 245.³⁷

SEC. 166. If the garnishee is defaulted at the return term, and is brought into the subsequent term, he may show or disclose that he had no property of the defendant in his hands at the time the garnishment summons was served. The default does not debar him from such answer, and is no confession of indebtedness.³⁸ But a collusion on the part of a garnishee will vitiate a judgment against him so that it cannot avail as a protection.³⁹ And it is intimated in Massachusetts, that although the rendition of a judgment will avail the garnishee as fully as if it were satisfied, yet the want of satisfaction may be a material fact on the trial of an issue wherein collusion is charged.⁴⁰

SEC. 167. Where a plaintiff summons one as a garnishee on account of property alleged to have been fraudulently trans-

³⁷ *Moger v. Lobengair*, 4 Watts, 391.

³⁸ *Sargeant v. Andrews*, 3 Greenl., 200.

³⁹ *Wilkinson v. Hall*, 6 Gray, 569.

⁴⁰ *Hull v. Blake*, 13 Mass., 158.

fferred by defendant to the latter, and the issue of fraud is thus set up and the garnishee prevails thereon, the plaintiff cannot be allowed afterward to re-litigate the fraud of the transfer against the defendant, who is thus regarded as in privity with the garnishee as to the property sought to be charged.⁴¹

SEC. 168. A garnishee is held to due diligence, like any other party, and if he negligently suffer a judgment against him by his negligence, he is without remedy,⁴² unless he can give a good excuse for his default, and also present a meritorious defense.⁴³ And so, when he is brought into court by summons, he must, like any other party, take notice of every thing which is done in the progress of the cause, and if a change of venue takes place he must follow the cause, or abide the results of his failure to do so.⁴⁴ And, in such a case, it will avail nothing that before the change he denied the indebtedness by a plea to which the plaintiff replies after change of venue, and in his absence prevails upon it.

⁴¹ *Bunker v. Tufts*, 57 Me., 419.

⁴² *Parmenter v. Childs*, 12 Ia., 27.

⁴³ *Fifield v. Wood*, 9 Ia., 252.

⁴⁴ *Chase v. Foster*, 9 Ia., 429.

CHAPTER XIII.

THIRD PARTIES.

Section 169. How Third parties Affected.

170. Strangers to Title.
171. Strangers to the Record.
172. As to Fraudulent Conveyance
173. Adverse Possessor.
174. Links in Chain of Title by Decree.
175. A mere Witness in Action.
176. Stranger to Action of Review.
177. Judgment against Debtor as to Suit between Creditors.
178. Collusive Judgments—Diligence.
179. Corporation and its Members.
180. Collusion of Firm Member.
181. Officer de jure and de facto as to Salary.
182. Prior and Subsequent Incumbrancers.

SECTION 169. There are some points on which third parties are incidentally affected by the rendition of a judgment, in a manner which admits of no remedy. And it is not always easy to determine who are third parties, and who are privies to the actual parties to an action. The general rule is, as we have already seen, that a party is one who has a right to control an action, etc., notwithstanding his name may not appear on the record of the controversy, and that sometimes the court will even disregard the party who is named, and take notice of the real party in interest, and allow him to govern the controversy, and again that the party named may sometimes invoke a party in interest himself to come in, and make defense; and as to the privies, the rule is that one is a privy who claims under either party.

A case arose in California, at a quite recent date, which illustrates the complication of parties in a remarkable manner. There were two partners who owned and operated a ferry across the Sacramento river, and during the partnership purchased lands with partnership funds, and for the purposes of the firm business. One of them became largely indebted to the other, and the creditor sold his interest in the lands purchased to a third person, as also his interest in the ferry itself, and all profits therefrom arising or already due. After the sale, the debtor partner for several months carried on the ferry, and received all the profits of the business. At length, however, the assignee of the creditor partner brought an action of account against the debtor, to wind up the firm business, and settle the individual rights of each, the creditor partner being likewise made a party to the action. On the trial, the debtor partner was found to be indebted to the plaintiff largely on account of the profits of the business after the sale, for which judgment was rendered against him, and it was decreed that the real estate which had been purchased was partnership property, and that it should be sold, and the proceeds be brought into court.

But, during the pendency of this action, the debtor partner had sold to a fourth party all his right and title to the real estate, and given a deed for it, the purchaser having actual knowledge of the pendency of the action, and having notice of the partnership, and of the indebtedness existing between the original partners; but no *lis pendens* was filed. Some time afterward, the judgment of the plaintiff not having been enforced, the plaintiff brought another action to have the interest of the grantor (the debtor partner) sold, and the proceeds applied to the payment of the judgment. On the trial, he produced the judgment or decree in evidence, to which the defendant objected. The court overruled the objection, and on appeal the decision of the point was sustained.¹

SEC. 170. It is a settled principle that a stranger cannot

¹ *Harvey v. Ward*, 49 Cal., 124.

set up defects of title in one claiming under another source, in confirmation of his own claim. For example, where plaintiffs claimed title to lands under one county, based on entry under the law granting indemnity for swamp lands situated in the county, and the defendant claimed under another county under the swamp land act, and the answer of plaintiffs attempted to defeat defendants' claim on the ground that the contract and deed of the county under which he claimed were fraudulent and void on account of alleged acts and irregularities, the court said: "Now the defects in defendant's title based upon the alleged fraudulent acts set out in the third and fourth counts of plaintiffs' answer to the cross bill which were assailed by defendant's demurrer, if established, would not constitute ground upon which plaintiffs may recover the lands. They must recover upon the strength of their own title, not upon the defects of that of their adversary. The counts demurred to, therefore, set up no matter tending to establish plaintiffs' right to the land. Can plaintiffs urge the matter alleged in these counts to defeat defendant's title to the land? As to this title, and each link in the chain thereof, plaintiffs are strangers, and for that reason cannot set up fraud and defects pertaining thereto to defeat defendant's claim of right based thereon. (*Secrest v. Green*, 3 Wall, 744; *Gregg v. Forsyth*, 24 How., 179; *Ritter v. Brendlinger*, 58 Pa. St., 68; Thompson's Appeal, 57 Id., 175; *Comstock v. Ames*, 3 Keys, 357.) This rule is based upon sound reason, as well as upon authority. Plaintiffs claim no rights under the title set up by defendant. The defects and infirmities set up in the counts assailed by the demurrer, if established, would not entitle them to recover. And whatever should be the judgment of the court upon issues involving these matters, it would not bind the persons whose rights were affected by the alleged frauds, and who were either parties or privies to the transaction, for they are not parties to this action. It would be vain, therefore, to determine these issues in this action. The respective conflicting titles under which the parties claim are by this action brought before the court for adjudication. If the lands

are found to be swamp lands, defendant will be entitled to a decree as against plaintiffs, and on the other hand, if it be determined that they are not covered by the swamp land grant, but were subject to entry by swamp land scrip, plaintiffs will recover in this action, as against defendant. Whatever judgment will be entered, it will only bind those who are parties to the record, and the rights of others will not be affected thereby."² For, in any event, "a fraud upon one does not form a claim on behalf of a stranger to the transaction, not claiming under the party defrauded. A fraud is an individual and personal thing; it is a cause of complaint to the person only upon whom it is committed; no other person can claim a benefit from it; a recovery by any other person is no defense to a claim by the party defrauded."³ And so, where one attempted to read in evidence a record of a partition suit resulting in a decree of sale of the interests of several of the parties under whom the plaintiff claimed title as a purchaser, and the Circuit Court overruled the defendant's objection to it, made on the ground that the sale had not been regularly conducted and the decree had been rendered against infants by default, and that it did not prescribe the manner of the sale, on appeal, the Supreme Court of the United States sustained the decision of the Circuit Court, because the defendants were strangers to the partition proceedings, and could not be allowed, therefore, to object to a result of which the parties to the decree had not complained.⁴ While judgment creditors may attack a judgment collaterally, when it is a fraud on them, they cannot do so when it is merely a fraud on the debtor. And a fraudulent judgment, like a fraudulent deed, is good against all except the interests on which the fraud directly bears, and hence such judgment creditors cannot call upon the court to vacate such judgment on the record so as to annul it as to all the world.⁵ And where a subsequent

² *Lathrop v. American Emigrant Co.*, 41 Ia., 548.

³ *Comstock v. Ames*, 40 N. Y., 359.

⁴ *Gregg v. Forsyth*, 24 How., 180.

⁵ *Thompson's Appeal*, 57 Pa. St., 178.

judgment creditor attempted to restrain a prior judgment creditor of the same debtor from collecting the judgment, on the ground that the note sued on was not properly stamped, the court discouraged the proceeding by holding that "it is not easy to see what he has to do with that. The judgment is not void which was finally entered upon the bills. The judgment is the act of the court, and if erroneous the error can be reached only by the party defendant. No stranger can contest it, and especially in this collateral way. If the defendant has not moved to set aside the judgment, certainly the plaintiff in this bill cannot complain for him or for the government. The plaintiff having a judgment, unimpeached for fraud upon the rights of creditors, standing upon the record, and in full force, no other judgment creditor can intervene for the government, or for the defendant. As a purchaser, the plaintiff in the bill has no better right. He took subject to the lien of the judgment, and as a mere volunteer for the use of creditors, and his title must give way to the judgment."⁶

SEC. 171. As to the legal consequences of the mere fact that a particular judgment has been entered, they are available against a third party—a stranger to the record.⁷ Judgments may be used *by* strangers in the way of inducement, or sometimes to establish collateral facts, or to show that a suit has been determined, to show that the judgment was actually rendered at such a date, and for such an amount, and, in proper cases, to show that a principal has been compelled to pay for the default of his agent, or the amount which a surety has been compelled to pay for the principal debtor.⁸ But a stranger cannot enter into the merits of a previous action; as, for example, a sheriff sued for the misconduct of his deputy cannot impeach the judgment under which the deputy was acting at the time of his malfeasance.⁹ And where one brought an action to recover possession of a horse, and the

⁶ *Ritter v. Brendlinger*, 58 Pa. St., 70.

⁷ *Maple v. Beach*, 43 Ind., 58.

⁸ *Chamberlain v. Carlisle*, 6 Foster, 553.

⁹ *Adams v. Balch*, 5 Greenl., 190.

plaintiff was nonsuited by means of the production of a previous judgment brought by the defendant against the sheriff who had taken the horse on execution as the property of the defendant, the court, on appeal, held that the nonsuit was improper because the plaintiff was not a party to the action against the sheriff, in any wise, and so the judgment was not available against him.¹⁰ Where one impeached the foreclosure of a mortgage on several grounds, it was held that the attacks being merely collateral, and not made by any one having any interest in the mortgaged premises, derived from the mortgagor or his grantees, the impeachment could not be allowed, and the foreclosure was wholly without the issue.¹¹

SEC. 172. An insolvent debtor conveyed a lot of land to A, and A conveyed it to B, who took it with notice that it had meanwhile been partially levied upon under an execution issued on a judgment rendered against the grantor in favor of C, but took it also before the completion of the levy. C brought a writ of entry against B, on which C contended, and there was evidence tending to show, that the conveyance was fraudulent as against creditors, and was held in trust for the insolvent grantor. It was, nevertheless, held, that as against B the judgment obtained by C against the insolvent was not conclusive evidence that C was a creditor of the insolvent even at the time of its rendition.¹² But the case is by no means a clear one, and I doubt whether there is any precedent for it, or whether it can itself pass into precedent in any other state than that wherein it was decided.

SEC. 173. In Missouri it has been held that one holding land by a mere naked adverse possession is not such a party in interest as can be permitted to attack a decree for irregularities which divests the title out of an original patentee and vests it in another.¹³

SEC. 174. Where a chancery decree constitutes a link in a

¹⁰ *Yorks v. Steele*, 50 Barb., 404.

¹¹ *Casler v. Shipman*, 35 N. Y., 540.

¹² *Inman v. Mead*, 97 Mass., 315.

¹³ *Mylar v. Hughes*, 60 Mo., 105.

chain of title, one not a party may use it, not as *per se* binding on any rights of the other party, but as an introductory fact to a link in the chain of his title, and constituting a part of the muniments of his estate. Thus STORY, J., said, in a case of the kind, delivering the opinion of the court: "In our opinion, this record was clearly admissible. It is true that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his title. Without establishing the existence of the decree, it would be impossible to establish the legal validity of the deed to the lessors of the plaintiffs, which was made under the authority of that decree; and under such circumstances to reject the proof of the decree would be in effect to declare that no title derived under a decree in chancery was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit because they were *res inter alios acta*."¹⁴ The rule seems to be this, "that records have been admitted in evidence, in suits not between the same parties, or privies, where, upon the facts of the trials and the recoveries in such records, the interests of others hung as incidents or consequences. And the production of such record is proof that the suit was brought, and the recovery had as therein set forth. But 'the consequences to others resulting from those facts apparent from the face of the record are to be established by appropriate evidence of such other facts as may be necessary to sustain the action or defense.'"¹⁵

SEC. 175. A judgment cannot be used against one merely because he was a witness in the action. So, where an action

¹⁴ *Barr v. Gratz*, 4 Wheat. (U. S.), 220.

¹⁵ *Key v. Dent*, 14 Md., 98.

was brought against a sheriff for the possession of a horse by one claiming the ownership, the horse being taken upon execution against a third person as judgment debtor, and the action resulted in a judgment for the claimant, it was held that the judgment debtor against whom the execution had been issued under which the horse had been taken, was not debarred from bringing an action against the successful claimant for the possession of the horse by the fact that he was a witness for the sheriff in the first action; because he was not in privity with the sheriff, was not a party to the record, and had no right to control the proceedings or appeal from the judgment.¹⁶ The court say: "Why, then, should he be bound by the adjudication? It was not a judgment against him in any sense, nor upon any right or interest which would subject him to an action for a recovery over, as in case of a failure of title upon the sale of chattels. But, besides all this, that was an action like this to recover the possession of the horse merely from the sheriff, and all that was there necessarily determined was that the defendant had at the time the right of possession as against the sheriff. Upon what the case turned we do not know. We can readily imagine a case in which such a judgment might have been rendered without determining the question whether the plaintiff here was at the time the real owner of the property as between him and this defendant. But, however that may be, it is plain, so far as appears, that the plaintiff has never yet had his day in court on the question of his title. There is nothing which proves or tends to prove that the present plaintiff defended or had any right to defend the former action. It is claimed by the defendant's counsel that the sheriff who was defendant in the former action was in a legal sense the agent or trustee of the present plaintiff in regard to the property, if it was really his. But this clearly is not so in any such sense as to make this plaintiff a party in that action, either in form or substance. The sheriff who was defendant in the former action

¹⁶ *Yorks v. Steele*, 50 Barb., 397.

was the agent of this plaintiff's adversary, and was acting under a power not derived from this plaintiff, but given to him by the law for the purpose of taking the plaintiff's property from him by force, if necessary, and against his will. They were not in privity as master and servant, or principal and agent. The plaintiff here was under no obligation, legal or moral, to defend the sheriff in that action, and had no legal right to do so, or even to interfere with it in any way whatever."

SEC. 176. A case arose in New Hampshire in this way: A party sued a deputy sheriff for damages sustained by the defendant's failure to keep property safely which had been attached in the plaintiff's behalf. The inquiry was concerning the measure of damages. It appeared that the plaintiff's attachment was subject to a prior one, in which the judgment was for a certain amount which, on review afterward, was considerably reduced, and so the point to be decided was, whether the review judgment, or the judgment which was thus reviewed and reduced, furnished the amount of deduction. The plaintiff in the secondary attachment had had no agency in procuring the review or prosecuting it, and the defendant (the deputy sheriff) maintained that the plaintiff ought not to have the advantage of a proceeding of which he did not assume the risks, and which he had no agency in or concern with. But the court held that "the review reversed the original judgment, and the judgment obtained by the review took the place of the original judgment. It was obtained upon a new trial of the issue, and must be regarded as the only judgment existing so far as regards the matter in issue. The entire absence of the plaintiff's interposition in prosecuting the review cannot, as has been intimated, preclude his taking an obvious advantage to himself in which the review has resulted, nor is that advantage to be incumbered by any accounting with the defendant for the pains and expenses that he incurred in prosecuting the review. He did not do it at the request of the plaintiff, nor is there anything in the cause to warrant us in saying that he did not do it for pur-

poses wholly foreign to the plaintiff's interests, although the result has been incidentally favorable to them. For whatsoever purpose, or from whatsoever motive the act was done, we are bound only to know that its conclusive effect was to reduce the judgment, and thus to exonerate the property to that extent; that the plaintiff being entitled to an interest in that property, subject to the judgment of Lovell and wife, it is the final judgment, and not that which was reversed and vacated, that must indicate the amount of their incumbrance; that this reduction of the judgment having been procured by the defendant without the privity or request of the plaintiff does not preclude the latter from taking advantage of it, and is a full answer to any claim on the defendant's part to retain out of the fund a recompense or reimbursement on account of the incidental advantage which the plaintiff has derived from his voluntary act.”¹⁷

— SEC. 177. A *bona fide* judgment against a debtor is held to be available in a suit between creditors relating to his property, as to the fact of indebtedness and its legal consequences. In part, at least, this is said to be because of the twofold relation in which the debtor may be considered as standing in regard to his property, namely: the relation of owner, and that of *quasi* trustee thereof for his creditors. Because of the latter relation he is not allowed to create a debt, or do anything *mala fide* to the willful prejudice of his creditors; but in the former relation he can create debts and is accountable to no one in the absence of fraud—so that a judgment obtained against him without collusion is conclusive evidence of the relation of creditor and debtor against others—in the first place it is conclusive on the parties for the usual reason; and in the second place, all claims on his property are through him, and are subject to all previous liens or conveyances or just preferences, made *bona fide*, so that any deed or judgment, so far as it concludes him, must conclude his creditors and all others. Hence, in his *bona fide* litigation, no stranger

¹⁷ *Stevens v. Sabin*, 20 N. H., 532.

or creditor can interfere to stay his cause for him, or question the effect of the judgment upon his property. The creditor's right to impeach any act of his debtor does not arise until the tacit condition annexed to the debt is violated, namely: that he will do nothing in fraud of his creditors. But if he does violate this condition, the creditor then does not claim *through* him, but adversely and by a paramount title over-reaching and annulling the fraudulent conveyance or judgment. But, otherwise, the judgment is conclusive on the fact and amount of indebtedness.¹⁸

SEC. 178. But even then one may, by laxity, fail to place himself in a position to challenge a judgment on the ground of fraud or collusion; as, for example, in New York it has been held that under the Code "two or more creditors who are upon the chase—*pedibus manibusque*—after the equitable assets of their debtor, the one who procures the first order [for an examination of the debtor] may acquire a sort of inchoate lien entitling him to an ultimate preference, provided he pursues his remedy diligently and consummates the proceeding by an order for a receivership and an appointment following thereon; but, even in such a case, if the creditor obtaining the first order quietly folds his hands and takes no further step, but permits a second order to be obtained, an examination to be had, and a receiver appointed and qualified, I should seriously question whether the latter would not override the first order, and the creditor obtaining it entitle himself to a preference not only on the ground of his superior diligence, but in accordance with the principle that it was the order for the receivership, completed by the appointment, that drew after it the title to the equitable assets, and made them inure to the benefit of the party who procured the order and perfected the appointment. This would be in harmony with the doctrine of the court of chancery which gave the preference to the creditor whose execution was first returned, provided he followed it up by a creditor's bill and the steps con-

¹⁸ *Candee v. Lord*, 2 Comst., 274.

sequent thereon. ‘But,’ as the chancellor says in *Edmeston v. Lyde*, ‘if he abandons the pursuit, or lingers on the way before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance.’ The time-honored maxim holds good here as elsewhere: ‘*Vigilantibus, non domentibus, leges subvenient.*’”¹⁹

SEC. 179. A corporation has no such privity with the persons composing it that a suit by the latter in their individual names, though styling themselves trustees of the corporation, will debar a suit on the same cause of action—as, for example, title to lands—brought subsequently by the corporation. The South Carolina court says: “In law, there is no identity between a corporation and the persons who compose it. A conveyance to a corporation vests the estate in the corporation, and not in the persons who compose it; and actions for wrongs to the estate of the corporation cannot be redressed by an action in the name of the individuals of whom it is composed.”²⁰

SEC. 180. Where the member of a firm colludes with another party so as to defraud a third person, the latter may sue the party thus colluding with the defrauding partner, and if the judgment is unproductive may afterward sue the firm and recover, provided the fraudulent transaction was apparently within the scope of the partnership business. There is a privity between the partner and the firm by the very nature of partnership, and there is none between the partnership and the first defendant so as to make the first judgment a bar to a second against the firm, although the defrauding partner was no party to the first suit.²¹

SEC. 181. In California a case arose in which the question was, whether an incumbent of an office who held over could claim the salary for the period he held over. His opponent had qualified on the day, or before it, when the term of office

¹⁹ *Voorhes v. Seymour*, 26 Barb., 585 and 583.

²⁰ *Trustees etc. v. Meetze*, 4 Rich., 55.

²¹ *Alexander v. State*, 56 Ga., 479.

commenced, and made a demand at the time, having contested the election and being afterward sustained in his contest, and declared by the County Court, and, on appeal, by the Supreme Court, entitled to the office. The former incumbent then yielded, but meanwhile had received, for the time he held over, the sum of seven hundred dollars paid to him by the board of supervisors on a *mandamus* against them by the District Court. To the *mandamus* proceeding neither the relator nor the respondent in the subsequent *mandamus* proceedings was party, although both were cognizant of the former proceedings and the judgment thereon. It was held in the second proceeding that the *mandamus* against the board of supervisors was unavailable because the relator was not a party, and because the board had no power over, or duty to perform with regard to, the salary of the office, and accordingly held that the respondent (the county auditor) should be compelled by *mandamus* to issue his warrant to the relator for the payment of the salary from the county treasury notwithstanding the previous payment to the former incumbent under the order of the board of supervisors acting by force of the *mandamus* issued against them. The court said that the former incumbent in retaining the office acted at his own peril, and that, on an adverse determination, he became a usurper *ab initio*, and could claim nothing for services rendered meanwhile—the salary being annexed to the title, and not to the occupation and exercise of the office.²² The New York Supreme Court has defined the distinction in this respect between a right of salary and a right to protection in the *de facto* administration of the affairs of the office thus: "The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office. An officer *de facto* may be protected in the performance of acts done, in good faith, in the discharge of the duties of an office, under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. Public inter-

²² *Dorsey v. Smyth*, 28 Cal., 25.

ests require that acts of public officers, who are such *de facto*, should be respected and held valid as to third persons who have an interest in them, and as concerns the public in order to prevent a failure of justice. (2 Kent's Com., 295.) But it does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of office, without legal authority, as if he were an officer *de jure*. When an individual claims by action the office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield of defense, but cannot, as against the public, be converted into a weapon of attack to secure the fruits of the usurpation and the incidents of the office "²³ — nor *per consequence* to prevent the rightful claimant from asserting his rights to the emoluments.

SEC. 182. As to prior and subsequent liens, it is considered that the holders are so far strangers instead of privies that a suit to bind the former in any way must make them actual parties;²⁴ and, also, as to subsequent incumbrancers. Whatever may be the nature of their liens, however—even if in a foreclosure suit their rights are wrongly stated—being made parties, they must guard their interests, or be foreclosed in respect thereto by the results.²⁵ But, in a partition suit, a stranger holding adversely to all the parties is under no obligation to come in and contest, even if personally served with summons and made a party to the record.²⁶

²³ *People, ex rel. etc., v. Tiernan*, 8 Abb. Pr., 361.

²⁴ *Hall v. Harris*, 11 Tex., 303; Story Eq., § 207

²⁵ *Benjamin v. R. R.*, 49 Barb., 448.

²⁶ *Cook v. Allen*, 2 Mass., 466.

CHAPTER XIV.

PARTIES BY NOTIFICATION.

Section 183. Warranty and Indemnity.

- 184. General Rule as to Notice.
- 185. Contribution between Sureties.
- 186. Nature of Undertaking.
- 187. Replevin against Officer.
- 188. Pennsylvania Rule as to Notice.
- 189. Notice to Official Surety.
- 190. Surety of Executor, etc., not Privy.
- 191. Georgia Decision thereon.
- 192. Individual and Official Misconduct.
- 193. Municipal Corporations herein.
- 194. Covenantors.
- 195. Private Indemnities.
- 196. Indemnity against Suits.
- 197. Vendor in Ejectment Suit.
- 198. Notice between Public Carriers
- 199. General Rule of Mutuality.

WE have already, in part, treated this topic, in the previous chapters on Party Answerable Over, and on Landlord and Tenant, on Warrantors of Title, and Sureties, but incidentally. Referring to those chapters for a partial view, we will consider the following additional points directly, instead of collaterally, thus bringing the subject into more distinct notice.

SECTION 183. In all cases of warranty and indemnity, a judgment against the party to be indemnified, if fairly obtained, and especially if notice has been given during its pendency to the warrantor, is admissible in a suit on the contract of

indemnity.¹ Thus, where a debtor was arrested and imprisoned on a *ca sa*, and the sheriff took a bond for granting to the prisoner the liberties of the jail, and was afterward sued successfully for the escape of the prisoner, and notified the sureties on the liberty bond of the pendency of the action, who came in and aided him in defending, and afterward he brought suit on the indemnity bond, it was held that the judgment rendered against him was conclusive against the sureties thereon, so that they could not be allowed to controvert the fact of the escape.² And in such case it is held that the sureties might control the first action so far as to prosecute an appeal, even although the sheriff himself would not be obliged to do it at their requisition.³

SEC. 184. “The rule in relation to notice was laid down by BUTLER, J., in the case of *Duffield v. Scott*, 3 T. R., 374, and has been adopted by able legal writers as a cardinal principle, settling the doctrine upon this matter (see 1 Smith’s Leading Cases, 139, 2 Greenleaf, § 116), and has also received the sanction of decisions of courts of the highest respectability. Justice BUTLER remarks: ‘The purpose of giving notice is not in order to give a ground of action, but if a demand be made which the person indemnifying is bound to pay, and notice be given to him and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action is not bound to pay the money.’”⁴ And, moreover, it is held that notice does not always require to be direct or actual, but circumstances amounting to notice or actual knowledge that the suit is pending may be sufficient to charge the indemnifying party.⁵ And it is enough, also, if notice of the suit is given without any further notice of the time of the

¹ *Clark’s Ex’rs v. Carrington*, 7 Cranch, 322.

² *Kip v. Brigham*, 6 Johns., 159.

³ *People v. Irving*, 1 Wend., 20.

⁴ *Gibson v. Love*, 2 Flor., 616.

⁵ *Ibid; Barney v. Dewey*, 13 Johns., 226.

trial, since one who has been thus notified that an action is brought is bound to know all subsequent proceedings without further notice.⁶

SEC. 185. Contribution between co-sureties comes within the scope of the rule. Thus, in a suit against one of two sureties, a judgment obtained against him without collusion, notice of the pendency of the action being given to the other, is effectual against the other one thus notified in a suit against him for contribution brought by the surety made a record party. Under the notice he is bound to employ every available defense, and if he does not he will not be permitted in the contribution suit to set up any defense which he ought to have set up in the original suit on the bond. It was his imperative duty to join in the defense, and failing to do so, under the notice, he waives all defenses against his co-surety.⁷

SEC. 186. But it is held that where the undertaking is merely that the principal shall perform a definite act, then an action will lie against the guarantor without any notice from the covenantee, although this is to be referred altogether to a different principle and a different kind of notice, and is, therefore, not really germane to the topic of this chapter. "The cases which have applied it are not departures from or exceptions to the general rule that a judgment concludes only parties and privies, but do not fall within that rule at all, being dependent only upon the principle that one may contract to be answerable to another upon such lawful conditions as he pleases, although 'when one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party.'"⁸ It amounts merely to this: That as against the principal a surety is only concluded by a judgment rendered in a suit which he had an opportunity to defend.⁹ And so of sureties on an administrator's bond.¹⁰ But the rule

⁶ *Blasdale v. Babcock*, 1 Johns., 517.

⁹ *Same Parties*, 35 N. Y., 120.

⁷ *Gibson v. Love*, *supra*.

¹⁰ *Annett v. Terry*, *Ibid.*, 256

⁸ *Thomas v. Hubbell*, 15 N. Y., 407.

can only apply where there is first a suit against the indemnitor, and then by him against the principal, and does not apply to the primary suit to which the usual commercial rule of notice, on the contrary, always does apply, as of non-acceptance or non-payment, and the like.

SEC. 187. If, in a replevin suit against an attaching officer, a judgment is rendered against the officer, this will be conclusive evidence of title in the claimant, not only as against the officer, but also as against one who, after the replevin, and having notice of it, has caused another attachment to be made. And it is immaterial that the second attaching creditor erroneously supposed the first attaching creditor would defend the replevin suit.¹¹

SEC. 188. Pennsylvania seems to hold an exception as to the necessity of notice in order to conclude the surety, although, on the other hand, it is there held that the amount of recovery against the indemnified party will not conclude the surety in an action against him by the former, because the amount might be aggravated by the misconduct or default of the indemnified party himself. The court says, in such a case: "The contract of suretyship is, that Potteiger and Rice will save the sheriff harmless in case he should levy on certain goods alleged to belong to the defendant in the execution, but claimed by another. Did they do so? If not, what damage did the sheriff suffer by the default? These are the true questions of the case. The answers are, that they appeared and made the best defense they could in the suit against the sheriff, and by compromise fixed the amount of the recovery. Then they did not save him harmless, but allowed him to be sufferer to the amount of that judgment, and therefore the bond of the surety is broken, and a certain amount of loss sustained, and this is just what the surety engaged should not take place, or that he would pay for it if it did. The record of the suit against the sheriff was proper evidence to show that the very thing had happened which the surety contracted

¹¹ *Carlton v. Davis*, 8 Allen, 94.

that his principals should not allow to happen. Of course it was not conclusive of the amount, for the surety might have shown that the amount was increased by reason of some fault of the sheriff for which the bond was not intended to secure him.”¹²

SEC. 189. In Ohio, the rule is that where notice is not given to an official surety, the recovery of a judgment against the principal is merely *prima facie* evidence, which, indeed, will avail in the absence of any countervailing proof, but which will not debar the surety in the action from attacking the former judgment, and opening up the merits for inquiry, any more than from impeaching it, for fraud or collusion—as also it has been so held in Pennsylvania, Massachusetts, and Virginia.¹³

SEC. 190. It has been held that there is no privity between a guardian, executor, or administrator, and his sureties; so that, in the absence of a special stipulation to that effect in the bond itself, a judgment against the principal will not conclude the sureties, although it will be *prima facie* evidence against them. And where the bond stipulates that the principal “will well and truly pay and deliver the legacies named in the will, so far as the law will charge him,” it is not to be construed to constitute an agreement to be concluded by a judgment against the principal. The Mississippi court thus lays down the rule: “As a general rule, the liability of a surety is not to be extended beyond the terms of his contract; incidents and intendments not necessarily deducible from the language employed are never indulged. The contract of the surety is, that the executor shall deliver the legacy so far as the law will charge him. He agrees to be liable for the just and faithful administration of the estate belonging to the testator. He does not contract to be bound for the distribution or administration of property not belonging to the estate, or for the neglects, omissions, or mis-judgments, of his principal, or the agents or officers of the law in suits to which he was neither a party or privy, and of which

¹² *Hazzard v. Nagle*, 40 Pa. St., 181.

¹³ *State v. Jennings*, 14 Ohio St., 76, and cases cited.

he had no notice. He is not bound to make good the errors of courts, of counsel, or parties, by which the property of third persons not belonging to the estate are decreed to be subjected to the course of administration, without his default. And neither the law, justice, nor common honesty, would be promoted by such a construction of his contract. There is nothing, therefore, in the nature or character, or terms of this contract of suretyship, from which it can be fairly inferred that this surety agreed and covenanted to be bound and concluded by the orders, judgments, or decrees of the probate, or any other court, to which he was neither a party nor privy. * * It is most indubitable that this surety cannot be regarded as either a party, or in privity with any party, to the judgment against his principal in the bond. He had no right to manage, or control, or in any manner interfere with the suit on which it was founded, nor was he even notified of its existence. He was not, therefore, a *party*. He had no relationship of any character to the *rights of property* here involved. He did not even occupy a relationship as close as that of a co-executor or co-administrator, between whom it is held no privity exists, so as to make admissions by one evidence against the others. He had no power or authority over the estate, and certainly no interest in the property. He was not, therefore, a *privy*.¹⁴

SEC. 191. The Georgia court, in a vigorous opinion, rendered in 1846, says, on this subject: "In *Joiner v. Cooper*, 2 Bailey 199, the court say that the surety may look into the decree 'in order to see that he is charged only for the accounts or duties, the faithful performance or discharge of which he has undertaken to guaranty.' We are unwilling to limit the rights of the sureties to a *looking into the decree*, as in that case defined. We believe that the decree is evidence against the surety until he shall rebut it by counter-testimony, and that he is permitted to inquire *ab origine* into the justice of the decree. He is not restricted to the inquiry whether the decree charges him only for such accounts or duties, the faith-

¹⁴ *Lipscomb v. Postell*, 38 Miss., 488, and cases cited.

ful discharge or performance of which he has guaranteed. But he may make inquiry into the correctness of those accounts, or into the faithful performance of those duties; or he may set up any defense which the principal could have set up against the rendition of the decree, or which he could have set up had he himself been a party to the proceedings [as by notification]. We are satisfied that the rule thus laid down is sustained by the authorities, and it is clearly founded in equity. Is it not enough that a decree *inter alios* is *prima facie* evidence against a party having no notice? * * * * *

The surety now before this court was not a party to this suit in equity; he had no notice, so far as the record discloses, of its pendency; of course, he was not heard in his own defense in that suit. It is contrary to natural justice, and also to all the analogies of the law, that one should be concluded by a decree to which he was not a party, and of which he had no notice. Such a rule would most effectually oust the security of his day in court. His rights would, by such a rule, depend upon the diligence or the fidelity of others. The principal might collude with the complainant, and permit an iniquitous decree to be rendered against himself in order to charge his surety. Human nature is unfortunately not too good for that; or, his carelessness or neglect might work irreparable injury to the security. The reason for our opinion is as strong as the authority is conclusive.”¹⁵

“The conclusion is inevitable, therefore, upon well established elementary principles, that judgments or decrees against executors, etc., are not *conclusive* evidence against the surety in a suit upon the bond.”

Sec. 192. It appears that official sureties may show, even in opposition to a judgment previously obtained against their principal for misconduct, that the misconduct was *individual* and not *official*, and, therefore, was outside of the bond; as, for example, where an officer takes an execution which the law does not allow him to serve, and especially if the principal

¹⁵ *Bryan, etc., v. Owen*, 1 Kelly, 369, 370.

himself has neglected to set up the fact as a defense. In a case of this kind, the court said: "The sheriff then, by taking an execution against his deputy which he could not legally serve was, as to his sureties, acting individually, and not officially. Not being authorized to make service, they cannot be liable for his unauthorized and illegal acts or omissions to act. In the suit against him for official neglect, he might have invoked in bar thereof the facts here admitted, and the defense would have been sustained. All these facts were known to him, and it was his duty to his sureties to have resisted the suit * *. It follows that, in truth, the sheriff, notwithstanding the judgment against him, has been guilty of no *official* neglect, however he may have personally misconducted himself in the matter. The facts agreed upon, without objection as to their competency or admissibility, fully established this. By the agreement of parties, there was no *official* neglect, and there being none, there is no liability on the part of the sureties for the unofficial misconduct of one holding the office of sheriff."¹⁶

With all proper respect and deference, I may be permitted to say that the distinction above is too finely drawn to be distinctly visible to me. Handling an execution certainly lies directly within the scope of a sheriff's legal duties, and handling one improperly and injuriously seems to be a malfeasance in performing the functions of his office, and, therefore, directly within the compass of his official bond. However, the declaration of the court that a surety unnotified is not concluded by the neglect of the principal in making defense is strictly correct according to the universal and necessary rule.

SEC. 193. Where a judgment has been obtained against a city, in an action for personal injuries from a defect in the highway within its limits, and during the pendency of the action, the city gives the tenant of the land notice of the pendency, and of the city's intention to hold him responsible for all damages recovered, and thus allows him opportunity to furnish evidence, and he testifies himself at the trial, but does

¹⁶ *Dane v. Gilmore*, 51 Me., 551.

not take on him the defense of the action, and the city brings suit against him subsequently to the recovery against it, the judgment is held to be conclusive on him as to the facts that the highway was defective, that the person was there injured while in the exercise of due care, and of the amount of the injury; but not of his (the tenant's) liability to repair the place, nor of his neglect in doing so, nor that his negligence caused the injury for which the city had been compelled to respond in damages.¹⁷

The rules in such case are, 1. The party whose negligence causes an accident will be bound by a judgment fairly obtained against one who is primarily held answerable, provided he has notice of the suit. 2. One placing obstructions in a highway, or failing to repair a highway which it is his duty to keep in order, is answerable to the municipal corporation, and if he has notice of a suit for an injury brought against the corporation by a traveler, he will be bound by the result. 3. But in an action against him, it must be proved, either by the record or by evidence *aliunde*, that the recovery was for the same cause on which he is sued in the second action; otherwise, the judgment obtained previously will be evidence of nothing except the fact of its rendition. 4. Thus, if the declaration in the first action alleged the damage to have resulted from an obstruction, and from want of proper repair and of a suitable railing, it must be shown that the recovery was for the obstruction, if the defendant was one not bound to the repairs, and evidence is admissible tending to show that the former recovery was not because of the obstruction, but for the want of repairs and of the railing.¹⁸

SEC. 194. As we have incidentally shown in a previous chapter, a covenantor vouched in to defend an action of ejectment will be held concluded by the result in a subsequent action on the covenant, provided, however, the plaintiff avers and proves that the eviction was by virtue of a lawful and

¹⁷ *Boston v. Worthington*, 10 Gray, 496.

¹⁸ *Littleton v. Richardson*, 34 N. H., 187.

paramount title to the premises existing at the time of the conveyance to him by the defendant; for a covenant for quiet possession and enjoyment applies merely to the acts of one claiming by title, and not by any wrong doing, and to rights existing at the time the possession was entered into by the covenantee.¹⁹

SEC. 195. We have noticed official indemnities above, and we may here remark that private indemnities rest on much the same basis, as, for instance, a bond to pay a certain debt, or to save one from liability or harm on account of it. In such a case, a judgment against him is at least *prima facie* if not conclusive evidence against the indemnifier, and his sureties, and that without notice.²⁰ And so, where one who assigned a mortgage covenanted that it should produce a certain amount over and above the costs of foreclosing, or else he would fill up the deficiency, and the mortgage was foreclosed without making him a party in any way, it was held that the foreclosure proceedings were evidence against him in an action on the covenant, to show the amount of the deficiency, and no fraud being alleged, the covenantor was concluded from questioning the amount found due on the mortgage by the decree of foreclosure.²¹

SEC. 196. Where the covenant is one of general indemnity merely, against claims and suits, a want of notice of a suit brought against the principal does not go to the cause of action, but in such case the judgment is *prima facie* evidence against the indemnitor and his sureties, and being only *prima facie*, it does not debar them in a suit on the covenant from showing that in the former action the principal had a good defense which he neglected to make, and thereby defeating the judgment. But where the covenant makes the liability of the covenantor depend on the event of a litigation to which he is not a party, and stipulates that he shall abide the result, herein

¹⁹ *Knapp v. Marlboro*, 34 Vt., 240.

²⁰ *Lee v. Clark*, 1 Hill, 58.

²¹ *Rapelye v. Prince*, 4 Hill, 119.

the particularity dispenses entirely with the necessity of notice, and the result is not merely *prima facie evidence*, but conclusive against the covenantor.²² In both cases, however—as, indeed in all cases—the engagement must be construed as saving the right which the law always gives in all suits between third parties, of contesting the proceeding on the ground of collusion to the defendant's injury.

SEC. 197. Where an action of ejectment is brought against the vendee of land, and the defendant allows judgment to go against him by default—being in possession merely under an unexecuted contract of purchase—the judgment is not conclusive against the vendor, notwithstanding he had notice of the suit, and cannot be set up to defeat an action of ejectment brought by him subsequently for the same land, since the relation of landlord and tenant does not exist between vendor and vendee.²³

SEC. 198. If one public carrier is sued for the loss of goods, and gives notice of the pendency of the action to a second carrier to whom he had delivered the goods for further transportation, and requires him to defend, the latter, nevertheless, will not be concluded by the result as to his liability.²⁴

SEC. 199. “It is a general rule that a verdict shall not be used against a man where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be mutual. This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence, the parties must be the same; for then the benefit and prejudice would be mutual and reciprocal. Where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterward make use of it; for between him and a party to such verdict, the matter is *res nova*, although his title turn upon the same point.”²⁵ To

²² *Insurance Co. v. Wilson*, 34 N. Y., 280, and cases cited.

²³ *Cadwallader v. Harris*, 76 Ill., 370

²⁴ *R. R. v. Packet Co.*, 70 Ill., 218.

²⁵ Starkie on Evidence, Vol. I, p. 331.

a greater or less degree, undoubtedly, all the cases hinge on this rule of mutuality which, therefore, may furnish a test by which to estimate the admissibility of judgments as evidence or as a bar to a subsequent action, so far as the question of parties or privies is concerned.

CHAPTER XV.

GENERAL PRINCIPLES OF RES ADJUDICATA AS TO ISSUES INVOLVED.

Section 200. Definition of Issue.

201. Whether Record must Show Issue.

202. Issue must be Conclusive.

We have now completed our examination of the rule of *res adjudicata* as to the *parties* to judgments, and those claiming under them; and as to parties answerable over; and, as to third parties generally, noting the modifications and apparent exceptions to the rule. The next general topic in logical order is to examine the *matters* upon which the doctrine operates as between litigating parties. This investigation will, likewise, run through several chapters immediately succeeding.

SECTION 200. Our first inquiry herein, is, what is to be regarded as a *matter in issue*? It is plain that there may be many subordinate and incidental matters tried during the controversy. But they are not to be considered as the matter in issue, in the sense of the rule. The New Hampshire court affords us a clear though not an exhaustive definition, thus: "Any fact attempted to be established by evidence, and controverted by the adverse party may be said to be in issue, in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried and may be the only matter put in controversy by the evidence of

the parties. But this is not the matter in issue, within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. The declaration and pleadings may show specifically what this is, or they may not. If they do not, the party may adduce other evidence to show what was in issue, and thereby make the pleadings as if they were special. But facts offered in evidence to establish the matters in issue are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence, are not in issue, even if their authenticity be denied. When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no *non est factum* involved in the matters put in issue by the plea of *nul disseisin* or not guilty, which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The verdict and judgment do not establish the fact one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly in one sense; that is, in the course taken by the evidence, it is direct and essential. But in another sense it is incidental and collateral. It is not a matter necessary of itself, to the finding of the issue. It may be made so by the parties.

"This may be illustrated by the case before us. Laying out of consideration the question whether this is a case between the same parties, the former action was for taking certain oats. The matter in issue was the title to the oats; and the conversion by the defendant in that case. Upon that the jury passed. They found that the plaintiff had no title, or that the defendant did not convert them, which may be involved in the first. It may be shown by parol evidence, if necessary, upon which ground the verdict proceeded; and it appears in this case that they found the plaintiff had no title. The conversion by the defendant in that case was not denied, if the plaintiff had title. That matter, then, is settled. The verdict and judgment may

be given in evidence in another action for the oats, between those parties, and is conclusive. But that is the extent of what was in issue. It appears that the title set up in that case was by a mortgage. In finding that the plaintiff had no title, the jury must have been of opinion that the mortgage was fraudulent. It is contended that this was in issue, and the only matter in issue. But this was only a controversy about a particular matter of evidence upon which the plaintiff then relied to show title. If that was the only matter in issue, the plaintiff might bring another suit for those oats against the same defendant, and relying upon some other title than that mortgage try the title to the oats over again. Can he do so? Clearly not; and the reason is, that it is his title which has been tried, and he is concluded. The title, however, which has been tried was only his title to the oats. The question whether the mortgage was fraudulent came up only incidentally, by reason of his relying on that as his title. But the mortgage was not the matter in issue. And while the finding is conclusive on the question of his title to the oats, it is neither conclusive nor evidence upon any thing else, because nothing else was in issue.

"It appears from this, that it is important to apply the rule to what was in issue in the action, and not to what was merely incidentally in controversy in the evidence. It is important for the security of both parties. In this case there might be no great mischief, if the rule were held to apply to matter in evidence instead of that in issue. The controversy in the former case seems to have been simple. If the parties were the same, the plaintiff might not complain of injustice if it were held that he is concluded by the finding of the former jury; having once submitted the controversy raised by the evidence whether the mortgage was fraudulent to a jury, and their verdict having shown that they must have so found it. But the principle applicable here must be applied in other cases where the matters in evidence are more complicated, and where it would admit of more doubt how the jury regarded the evidence, and what facts they actually found. The rule then

would have to be confined to what the jury must necessarily have found, which would still shut out as evidence a great many matters actually tried, and as clearly found as any thing found in relation to his mortgage, or it must in many cases, be left to the testimony of the jurors what facts they did find, which when applied to all the controverted matters of evidence arising in a cause might lead to great uncertainty and confusion. On the other hand, it would be great injustice to the defendant in the former action to hold that the matter in question was whether the plaintiff's mortgage was fraudulent or not; that this was tried in that case, and not his title generally; and that the plaintiff might commence another suit for the oats, and set up another title, because no other title except the mortgage title had been tried. The title to the property now in question has not been tried. If the plaintiff has no title to it but the mortgage, the defendant may show that the mortgage is fraudulent by the same evidence by which that matter was shown before." ¹ *

SEC. 201. As to whether the matter in issue must appear by the record or not, the court say in the same case: "There are cases which conflict to some extent with the principle we have thus stated, some of them holding that in order to make a record evidence to conclude any matter, it should appear from the record itself that the matter was in issue, and that evidence cannot be admitted that under such a record any particular matter came in question; while others maintain that a former judgment may be given in evidence accompanied with such parol proof as is necessary to show the grounds upon which it proceeded, where such grounds, from the form of the issue, do not appear from the record itself; provided that the matters alleged to have been passed upon be such as

¹ *King v. Chase*, 15 N. H., 15.

* The doctrine of this extract is in the strictest sense correct, but it may well be doubted whether its application has not been carried too far, since there may be more than one issue in a case. And if more than one, all may be principal issues, or some principal and others subordinate. And, in either case, the adjudication may be properly regarded as embracing the whole.

might legitimately have been given in evidence under the issue joined, and such that when proved to have been given in evidence it is manifest by the verdict and judgment that they must have been directly and necessarily in question, and passed upon by the jury. While, on the one hand, we do not, with the Supreme Court, deem it essential that the record should of itself, show that the matter was in issue in order to make the determination of it conclusive, we are of opinion, on the other, that the general principle laid down in the court of errors is too broad in holding the judgment to be conclusive upon all matters which might legitimately have been given in evidence under the issue joined, and such that when proved to have been given in evidence it is manifestly the verdict and judgment that they must have been directly and necessarily in question and passed upon by the jury, as this must include all matters which came in question collaterally by the evidence offered, if they were of such a nature as that it appears the jury must or should have passed upon them."

SEC. 202. The character and force of matters in issue, within the meaning of the rule, when offered as evidence, must be conclusive. On this the same opinion says, quoting from the leading case of *The Duchess of Kingston*: "'From the variety of cases' (said Lord Chief Justice DE GREY in that case), 'relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: *First*, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter directly in question, in another court; *Second*, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question though within their jurisdiction; nor of any matter incidentally cognizable,

nor of any matter to be inferred by argument from the judgment.””

The necessity of considering the evidence thus conclusive is thus illustrated by the court in the opinion drawn upon so largely herein: “There are cases which hold that it may be evidence between the parties when offered as a bar, but not conclusive evidence. (See Doug., 517, *Kinnasly v. Orpe.*) But this cannot be supported upon principle. The operation of such a rule would be to authorize the introduction of the verdict of one jury in evidence, not to show that the matter in question had been tried and settled, but to influence the minds of a jury having a similar question before them, to find the fact in the same way that the former jury found it, upon the faith that the first jury were capable, and duly investigated the subject upon competent proofs, and therefore probably found the fact correctly. It is quite evident that the weight to be given to it in that view is entirely uncertain. In order to understand its true value, and the weight which ought to be given to it in establishing the matter in question and upon trial, the capacity of the former jurors should be shown, and the manner of the trial, that it may appear how distinctly the proofs and arguments were laid before them. The proofs themselves, and the arguments used on the former trial, should also be shown, for, otherwise, the second jury could not know whether the case was fully considered. And to all these there should be added a statement of the grounds upon which the former jury proceeded in making up their verdict. It is only upon evidence of this character that the jury to whose consideration the verdict and judgment are offered as a matter of evidence which should have some influence in determining the disputed fact, can have any reasonable idea how much weight they ought to attach to it. But this evidence they cannot have.

“If a verdict and judgment are admitted as evidence of any matter tried and found, they furnish evidence that it has passed *in rem judicatam*. If so, that is not a mere matter to

influence a jury or not, according as opinion, whim or caprice, or even as a sound judgment respecting the competency of the former jury to judge, may dictate. As a mere fact, it has no bearing upon the merits of the case, in connection with other evidence of facts, to show the truth of the matter previously found; because it is not a fact which occurred in connection with such other facts; but it is of itself a conclusion or result, from the consideration or trial or admission of such other facts, or some of them. As evidence to show that the matter in controversy between the parties has been considered settled and passed into judgment, it is conclusive."

These copious extracts which I have made from the very able and elaborate opinion of the New Hampshire court may suffice as an outline statement of the general principles as to issues, especially as it embodies the concise, comprehensive, and complete rule enunciated in *The Duchess of Kingston's Case*, universally adopted in England and America. Several of the following chapters will be necessarily occupied in expanding the rule into its various applications.

CHAPTER XVI.

DIRECTNESS OF THE ISSUE IN THE FIRST ACTION.

Section 203. In action of *Indebitatus Assumpsit*.

- 204. Special or Implied Contracts for Labor
- 205. Trespass quare clausum fregit.
- 206. Case and Question of Title.
- 207. Ejectment and Prior Conveyance.
- 208. Questions of Assets and of Title.
- 209. License and Title.
- 210. Defense on one of two Promissory Notes.
- 211. California Court on Direct Issues.

THE rule of *The Duchess of Kingston's Case* requires that the judgment of the court be *directly on the point*.

SECTION 203. An action of *indebitatus assumpsit* was brought in Pennsylvania against a husband for boarding his *wife and child* during a certain time; and on the trial the judgment rendered in a former case between the same parties, for necessaries furnished the *wife alone* for a part of the same time was offered in evidence, with proof of the satisfaction of the judgment. But it was held not to be conclusive that the plaintiff had proved in the former suit that the husband had turned his wife out of doors, nor, in connection with the notes of the judge before whom the cause had been tried, and the notes of counsel in the case and the testimony of one of the jurors, was it regarded as conclusive that the only ground of defense had been the expulsion of the wife by the husband. The court held that all that was determined in the

first suit as an issue was, the liability of the husband, and not the grounds on which that liability rested; and, moreover, that the former liability depended upon the former relations, and the second upon the present relations of the husband and wife; that the issue as to the demand was different, and that the question of turning the wife out of doors was not the matter in issue in the former case.¹

SEC. 204. An action was brought on an alleged special contract with the defendant to labor for the plaintiff a year at a stipulated price, which the defendant had, as it was alleged, violated by desisting from the labor at the end of the first month. It was pleaded in bar that the defendant had sued the plaintiff for the month's labor; that in that action the plaintiff had set up that very special contract as a defense; that a jury passed upon the matter and found for the defendant (former plaintiff). The question in the first case then must have been, whether the present defendant had performed the month's labor under a subsisting contract which he voluntarily abandoned, and the jury must have found either that there had never been a special contract, or else that it had been rescinded by the parties. So that the jury in the first case must have decided the very question which was the gist of the second action, and the point to be decided was, whether it was therefore a bar in the latter. The court held that the contract was not directly in issue on the pleadings in the former suit, and thus explained the ruling thereon: "The question in the action which Nims (the laborer) brought against Towns (the employer) was, whether there was an implied contract to pay for a month's labor. Towns attempted to prove that the month's labor had been done under a subsisting contract to labor for a year, which contract had never been performed by Nims. This, if proved, was a decisive answer to the action, because if the labor had been done under a subsisting special contract to labor for a year, there could be no implied contract. Yet still the question in issue was,

¹ *Lentz v. Wallace*, 17 Pa. St., 415.

whether there was an implied contract, and although it must now be concluded that the jury found that there was no special contract, this conclusion is a mere inference from what they did find. They found there was an implied contract, and we infer from this finding that they could not have been satisfied of the existence of a special contract. It is therefore clear that the existence of the special contract was not directly tried in the first suit, and whatever may have been the finding of the jury in that case in relation to the special contract, it can conclude nothing in this case."² And yet I doubt whether, in general, our courts would be inclined to draw the line of distinction so rigidly.

SEC. 205. An action of trespass *quare clausum fregit* was brought, in which the question arose as to the taking of a certain piano, and the title to the piano was litigated and determined by the jury. Afterward, in an action of replevin for the piano, the judgment in the action of trespass was offered to prove title. But the court held it inadmissible, because the gist of the former action was the breaking and entering into the house of the present defendant (former plaintiff); that the taking of the piano was only alleged in aggravation of damages, and that the title to it, therefore, was only an incidental or collateral question. *Held*, also, that the rule could not properly be applied to collateral facts, or facts to be deduced by inference from the former finding of the jury.³ The same court, however, in a case where suit was brought upon a promissory note, given at a certain time with another note, decided as follows: The note was signed in the name of the firm sued, and a former judgment was offered to show that on the other note the defendants were decided to be partners at the time the notes were given, they being sought to be charged as partners in the pending suit; *held*, that the judgment was admissible, although it would seem that the question of co-partnership was incidental to the gist of the action, namely the liabil-

² *Towns v. Nims*, 5 N. H., 263.

³ *Gilbert v. Thompson*, 9 Cush., 348.

ity of the defendants on the note in suit; and even this was another note, and not the same which in the former had been passed upon, so that the matter seems to be inferential. The court, also, in a case decided at the same term with that immediately noted above, lays down the general rule prevalent in the state, in much broader terms than the one just cited would appear to warrant: "We consider the rule well settled in this commonwealth that to render a former judgment between the same parties admissible in evidence in another action pending between them, it must appear that the fact sought to be proved by the record was actually passed upon by the jury in finding their verdict in the former suit. It is not necessary that it should have been directly and specifically put in issue by the pleadings, but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled in the suit in which the former judgment is offered in evidence. And parol evidence is admissible to show that the same fact was submitted to and passed upon by the jury in the former action, because, in many cases, the record is so general in its character that it could not be known without the aid of such proofs what the precise matter in controversy was at the trial of the former action."⁴ How this can be reconciled with another decision of the same court, I do not perceive, namely: "This estoppel is attended with conditions and qualifications which must be strictly observed, without which it would sometimes operate harshly by excluding the truth. It must be an averment of a fact precisely stated on one side, and traversed on the other, and found by the jury affirmatively or negatively, in direct terms, and not by way of inference."⁵

SEC. 206. In an action on the case for obstructing a way claimed by the plaintiff as appurtenant to the land, a verdict and judgment on the general issue is not conclusive on the question of title. And it is a general rule in torts as well as

⁴ *Dutton v. Woodman*, 9 Cush., 261.

⁵ *Sawyer v. Woodbury*, 7 Gray, 502.

actions *ex contractu*, that nothing is conclusively settled by a judgment except the point directly in issue.⁶ However, in case for the *continuance* of the obstruction, the judgment in the former action on the general issue may be admitted as evidence to show the plaintiff's right of way, although it will not be conclusive.⁷ If, in an action of trespass, the title is put in issue by a plea of soil and freehold, the verdict will be conclusive thereon in another action of trespass on the same land. So, in actions on the case for interruption of an easement, on the general issue the title is not settled, but if the title is pleaded in bar, and issue is taken on it, the judgment will be conclusive.⁸

SEC. 207. Where in a former action of ejectment a fact in issue was whether the defendant had knowledge of a prior conveyance, so as to charge him with notice, the decision on this fact does not conclude an inquiry in a subsequent action as to the validity of such prior conveyance, because the validity of the conveyance was not directly in issue in the first action.⁹

SEC. 208. Where the precise issue in a former suit was whether the lessors of the plaintiff and the other defendants in that suit had lands by descent or devise that were assets to pay the testator's debts, and during the controversy the lessors' title to a certain lot came into dispute, the latter point was held to have been collateral, and therefore not available in a second action where the issue of title to the lot was the gist of the suit.¹⁰ And so, where the former issue was whether the defendants had committed a trespass, and the question was tried and determined whether a certain deed had been delivered, it was held that the verdict and judgment only settled this point conclusively for the purposes of that action, and were inadmissible in a subsequent action on the title under the deed.¹¹

⁶ *Standish v. Parker*, 2 Pick., 21.

⁹ *Spooner v. Davis*, 7 Pick., 148.

⁷ *Parker v. Standish*, 3 Pick., 288.

¹⁰ *Jackson v. Wood*, 3 Wend., 36.

⁸ 2 Pick., 21, *supra*.

¹¹ *Fogg v. Plumer*, 17 N. H., 115.

SEC. 209. Where a city sued one for keeping a wharf-boat without a license, and the determination was that he had a right to keep the boat without a license, and afterward he brought a bill for an injunction against the city to restrain it from suing persons for landing boats at the wharf without the payment of wharfage, the former judgment was held unavailable, because, although the court therein held that the defendant had the right of soil, and thereon decided that in law he had the right to keep the boat, and, therefore, rendered judgment for him, yet all this, except the mere judgment, was only incidental, and not the direct issue.¹²

SEC. 210. A promissory note was put in suit which was one of two given on the sale of a vessel. The other note had been sued on previously, and the defense was fraud on account of the unseaworthiness of the vessel. On this plea, the defendant prevailed in the action. The judgment was held available in the second action, on parol proof that under the former plea of *non assumpsit* the question of fraud had been thus adjudicated.¹³

SEC. 211. Some general remarks of the California court on the matter of direct issues, and of the discrepancies of authority on some points, will appropriately close this chapter: “The plaintiff, although showing no title other than one derived through a sale under a judgment and execution against the city of San Francisco, and admitting that the demanded premises were a portion of the public lands of Yerba Buena, does not question the authority or effect of the decision in the case of *Hart v. Burnett* (15 Cal., 530), but claims that his title derived in this way has become a good and valid title by virtue of a judgment pronounced in a case between the city and county of San Francisco, plaintiffs, and the San Francisco Gas Company, Frank M. Pixley, and Charles Doane, sheriff, defendants. By this judgment, it is claimed that the question of the plaintiff’s title has become *res adjudicata*, and that the

¹² *Haught v. Keokuk*, 4 Clarke (Ia.), 207.

¹³ *Gardner v. Buckbee*, 3 Cow., 127.

judgment is binding upon and conclusive against the parties to that judgment, and all other persons. In order that a judgment should be a defense in another action on the ground of *res judicata* the same point must have been *directly* in issue, and determined by the judgment. There is frequently much difficulty in deciding what is to be considered the point which was *directly* in issue, and which is to be treated as having been so settled by the judgment as to be held forever *res judicata*, and from the number of decisions to which this difficulty has given rise, cases may be cited favoring the most extreme views in either direction, on the one hand holding that any matter that was litigated in the case, or even that might have been litigated, is to be deemed to have been *directly* in issue, and on the other hand holding that only the ultimate matter as to which the judgment gives or denies, relief is to be deemed to have been the point directly in issue. An instance of the latter class is to be found in the case of *King v. Chase* (15 N. H., 9). The following cases are to the same effect: *Nael v. Willis* (1 Lev., 235), *Hotchkiss v. Nicholls* (3 Day, 138), *Colt v. Tracey* (8 Conn., 268), *Astin v. Parker* (2 Burrows, 666), *Gilbert v. Thompson* (9 Cush., 348). In the case of *Bennett v. Holmes* (1 Dev. and Battles, 486), Judge GASTON gives the rule in these words: ‘A judgment, therefore, in any action, is conclusive only as to what it directly decides. As the judgment is the fruit of the action, it must follow the nature of the right claimed, and the injury complained of, and can conclude nothing beyond them.’

“The question now before the court is the *title* to the demanded premises. Was that the point *directly in issue*, in the former action? In order to determine this question, we must consider what was the direct or ultimate object of that action, what was the injury complained of, and what was the relief asked, or which could be obtained, by the judgment of the court. It was not an action to quiet title. The complaint did not ask for a judgment that the title was in the plaintiff, or not in the defendant; it did not ask a judgment that the

title had not passed by the sale, or that a title would not pass by the deed threatened to be executed in pursuance of the sale. The injury complained of was that the threatened deed would be a cloud upon the plaintiff's title; and the only relief sought was an injunction to prevent the doing of the act by which the cloud would be created. It was directly alleged in the complaint, and denied by the answer, that the deed would create a cloud upon the title; and this allegation and denial formed the precise issue that was to be decided, and upon the decision of which the judgment was to turn, and the relief asked was to be granted or refused. In such an action, the only point that could be *directly* in issue, and be the exact matter settled by the judgment of the court, was, whether the threatened deed would be a cloud upon the title. Various reasons were given, or facts stated in the complaint, to show that the deed ought not to be executed; but whatever may appear to have been the views of the court upon these facts, they did not, either of them, constitute the direct point in issue. The only judgment that could be given was merely a granting or denial of an injunction; and the only direct point upon which that judgment could be based was, that the deed would or would not be a cloud upon the plaintiff's title. Although the judgment of a court of equity is equally effectual as *res judicata* as that of a court of law, the nature of their different jurisdictions must be considered in order to determine what was the exact matter decided. It is suggested that whether or not the deed in question would constitute a cloud upon the title is a conclusion of law, and that the decision of this point would not determine any fact litigated by the parties. Without inquiring whether this should be considered a conclusion of law, or a resulting fact, it is sufficient to say that it is a point put in issue by the pleadings, and upon which the judgment proceeds and rests. Whether the preceding facts alleged are true or not is immaterial, if, being true, they do not make out a case for the exercise of equity jurisdiction. If, in order to determine the case as one of equity jurisdiction, it was only necessary to decide whether or not the deed would be a cloud upon the title—that

is the direct point in issue, and the only one that becomes *res judicata* by force of the judgment. As an illustration, suppose a complaint is filed to enjoin a sheriff from executing a deed, and as a ground it is charged that there was no valid judgment to sustain the sale, and hence, as a resulting fact, that no title passed by the sale, and that the deed would be a cloud upon the title. If the answer should deny the allegation that there was no judgment, and should further insist that if there were a judgment, the deed would constitute no cloud upon the title, and the court should thereupon deny the injunction and dismiss the complaint, would it be held in a future litigation that it was *res judicata* that the title had passed? Or, suppose a complaint filed to enjoin a tax collector from executing a deed under a tax sale. Various irregularities in the proceedings of the assessor and collector might be stated in order to show that the deed ought not to be executed; in other words, to show that the title had not passed by the sale. But the simple statement of these facts would not give a court of equity jurisdiction of the case. It would be further alleged, as the direct point of the case, and upon which the judgment of the court must be based, that the deed to be executed would be a cloud upon the plaintiff's title. If the court should refuse the injunction, dismiss the bill, and the purchaser at the tax sale should take his deed, and upon it bring an action of ejectment against the plaintiff in the former action, would the judgment be held as having conclusively decided that there were no irregularities in the tax proceeding, and that the title had passed? I think not. The case might be decided upon the views of the court, whether right or wrong, as to whether the deed would or would not create a cloud, and without reference to the truth of the facts alleged to show that the deed ought not to be executed.

"So obvious does it appear that a simple judgment denying the relief asked and dismissing the bill could not be considered as deciding the question whether the title had passed, that I presume if nothing more had been stated the idea would not

have been suggested. But, in addition to the judgment which decided the case, there was inserted in that judgment a direct adjudication that the title had passed, and that the purchaser was entitled to a deed. This was done some six months after the deed had been actually executed, and was plainly done for the express purpose of making the case *res judicata* upon this point. I think, however, this makes no difference. As we have seen, it is the point as to which relief is sought, and upon which the judgment rests, and not any incidental or secondary matter, that may have been controverted by the parties, that becomes *res judicata*. That these subsidiary judgments should not be treated as being *res judicata* is the more apparent in this case, as no judgment upon those points was asked in the complaint, and no direct issue was made upon them by the pleadings, although they may be said to be put in issue inferentially.”¹⁴

¹⁴ *Fulton v. Hanlow*, 20 Cal., 485.

CHAPTER XVII

CERTAINTY OF ISSUES.

Section 212. Not Informal Submission.

- 213. Reasons not Assigned.
- 214. Uncertain Manner of Fraud.
- 215. Burden of Proof on the one who pleads former Judgment.
- 216. Not mere Probable Inferences.
- 217. Matters Impliedly and Necessarily in the Issue.
- 218. Example in Issuing Railroad Bonds.
- 219. Validity of Contract in action of Warranty. .
- 220. Note Pleaded in Discharge binds Afterward.
- 221. Two Notes on Same Consideration not within the Rule.
- 222. Meritorious and Technical Issues—Former Presumed to have been Found.
- 223. General Decision on Diverse Issues not Conclusive.
- 224. Inference must Exclude Doubt.

SECTION 212. Plainly, it is a corollary of the general proposition that issues must be direct, and not merely collateral; and that they should also be clear, definite, distinct and certain; since it is not every informal submission of a fact to a court and jury which precludes subsequent inquiry into the truth of it.¹ Thus, in an action for board, in which a previous divorce suit a *mensa et thoro*, and also another, a *vinculo*, was set up as a defense—the latter being previously rendered in another state, and the former brought in the same state in which the action was pending and being dismissed—as to the former, the appellate court said: “It is clear that when

¹ *Martin v. Gemandt*, 19 Pa. St., 130.

the court took the several findings of the jury into consideration, and dismissed the libel *a mensa*, nothing more was determined than that, for one of two reasons, the libellant had failed to maintain her case. It is left wholly uncertain and unascertainable whether the libel was dismissed on the ground that no *delictum* or cause of divorce alleged against the libellee had been proved, or because there had been a previous dissolution of the marriage; and hence the decision could not be regarded as establishing the validity of the previous divorce *a vinculo*.²

SEC. 213. Where there was a petition filed to enforce a lien on a vessel for labor in constructing it, and in defense a general decree dismissing a former petition to enforce the same lien was produced, which decree had been rendered on an agreed statement of facts from which it appeared that the former petition had been prematurely brought, and might have been dismissed for that reason, the appellate court said: "The agreed facts appear to us to admit a cause of action except for these objections; but the entry was in general terms; no specific reasons were assigned, and we cannot explore the mind of the court to ascertain what the real reasons were. It may, therefore, be left uncertain whether the former judgment was against the merits of the petitioner's claim, or was based on these technical objections. To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is pleaded, or introduced in evidence. It is not enough that the question was one of the issues in the former suit; it must also appear to have been precisely determined."³

SEC. 214. Where, in a former suit between the parties a deed was determined in general terms to be so tainted with fraud as to be void, but the determination left it uncertain in what way it was void, whether absolutely, as between grantor

² *Burlen v. Shannon*, 99 Mass., 207.

³ *Foster v. The Richard Busteed*, 100 Mass., 411.

and grantee, or only as against creditors under the statute of frauds, the judgment will be unavailable in a subsequent suit because of its uncertainty. And so, if a deed conveys two distinct parcels of land, and is held fraudulent, but the decision is coupled with an uncertainty as to whether as to the two tracts conveyed therein it is tainted with fraud, or if so, with the same kind of fraud, the character of the deed cannot be held *res adjudicata*, because of the indefiniteness of the decision thereon.⁴

SEC. 215. The burden of proof as to the former issue is on the defendant who sets up the judgment as a defense, and he must make it clear and decisive by the record, or else by parol evidence, where the latter is allowed. So, where a defendant was plaintiff, in a former action, brought to recover for rye, wheat, and corn, and recovered a verdict, but whether for the wheat, rye or corn did not appear, it was held that the judgment was not available in a subsequent action wherein the parties were reversed, brought on the wheat contract, although had the former action been brought for the value of the wheat alone, the judgment therein would have been conclusive, or if the defendant could show that the recovery included the wheat.⁵

SEC. 216. The rule of certainty precludes merely probable inferences. Says the New York Supreme Court: "We are asked to infer that the judgment [of reversal] was pronounced on the merits, that is, to infer that the adjudication proceeded on a particular ground, and, basing our conclusion upon such inference, to hold the adjudication conclusive. As I understand the rule, 'a particular ground of adjudication can never be inferred, and relied upon as conclusive,' to bar a right of action. A judgment is no evidence of a matter to be inferred from it by argument. The rule is that it must clearly and distinctly appear from the record, or from proof *aliunde* the record, when such proof is admissible, that the particular ground urged was considered and passed upon by the court in

⁴ *Chase v. Walker*, 26 Me., 558.

⁵ *Lawrence v. Hunt*, 10 Wend., 85.

the former suit, or the adjudication will not operate as a bar in a subsequent action. The onus of proof, too, in such case, is on the party who relies upon the adjudication as a bar, and he must make it appear that the precise point was considered and passed upon in the former suit.”⁶ While verdicts and judgments conclude matters which they profess to decide, and which are necessary to uphold them because those matters were properly in issue, and were the subjects of inquiry on which they were judicially determined, yet as to facts on which the court could not have based an inquiry, no inference can be drawn from the judgment.⁷

SEC. 217. However, it has been held that not only is the judgment of a court conclusive on all questions actually and formally litigated, but likewise as to all questions *within the issue*, whether formally litigated or not; that is to say, all matters which are *impliedly* and *necessarily within the issue* joined, and the determination of which is *necessarily* included in the judgment. Thus, where a physician and surgeon brought suit for services, before a justice of the peace, and the defendant set up the defense of *malpractice*, but withdrew it and went to trial on his general denial, when the plaintiff recovered on his claim, it was held in a subsequent suit, directly brought for the alleged malpractice, that the fact of performance of the contract by the physician was impliedly averred and denied by the parties in the former suit, so that the judgment necessarily included the fact of performance by the plaintiff, and would bar any further litigation of that fact; and also held that notwithstanding the defense of malpractice was withdrawn in the first action and was not formally and actually litigated, yet it was necessarily within the issue actually tried, and was therefore conclusively determined by the judgment therein.⁸

SEC. 218. Where a board of supervisors were judicially

⁶ *Vaughan v. O'Brien*, 39 How. Pr., 519.

⁷ *Dickinson v. Hayes*, 31 Conn., 427.

⁸ *Bellinger v. Craigie*, 31 Barb., 534.

required to issue bonds on a subscription in aid of a railroad company, and afterward an action was brought to compel them to countersign and deliver the bonds, wherein it was alleged in defense that the legislative act authorizing the subscription had not been obeyed in the election it prescribed, but that the said election was not "fairly or properly or legally conducted, but was affected, influenced and controlled by corruption and bribery" by the company, through its agents, etc., the answer was held unavailable, because this matter must have been involved in the former proceedings instituted to compel the subscription. The court say: "It will be seen on reading the act that the board could not be required and were not permitted to subscribe to the capital stock of the company unless a majority of those voting upon the proposition voted in favor of the subscription. It was absolutely essential, therefore, in instituting proceedings against the board to compel the subscription to be made, that the relator should allege, and if it was denied by the board, to prove on the trial that a majority of the votes cast were in favor of the proposition. The fact must have been found by the court or have been admitted by the pleadings; in other words, the facts must have been alleged and must have been true, for it was the fundamental fact in the action; and in its absence the court could not have rendered the judgment that was pronounced commanding the board to make the subscription and issue the bonds. The matter thus became *res adjudicata*, and not subject to be again litigated in another action between the same parties."⁹ And so, where the question was as to the effect of a certain indemnity bond, and a former judgment was set up, it was held that this question must be considered settled because it was absolutely necessary to have been determined by the court in order to render the judgment.¹⁰

SEC. 219. Where one declares upon a warranty of chattels sold, he is held to affirm necessarily the validity of the con-

⁹ *People v. Supervisors*, 27 Cal., 675.

¹⁰ *Stewart v. Stebbins*, 30 Miss., 81.

tract of sale; because, the warranty cannot stand independent of the sale, being inseparably connected with it and forming a part of it, and being indeed only one of the stipulations of the main contract, so that it can neither be alleged or proved or judicially found to exist, except as a part of the sale. Therefore a judgment affirming a warranty also necessarily affirms the contract of sale, so that the existence and validity of that contract, being within the issue, are *res adjudicata*.¹¹

SEC. 220. A defendant being sued on a promissory note prevailed against the plaintiff by setting up another note as given in discharge of the note in suit. Afterward, being sued on the note by which he had thus successfully defended himself, he set up the plea that it was not valid because of the non-fulfillment of a condition on which it was given. It was held that the plea could not avail because the validity of this note was within the issue of the former action — the conclusiveness of a former action extending to every fact necessarily involved in the first adjudication, for “where a conclusion is indisputable, and could only have been drawn from certain premises, the premises are equally indisputable with the conclusion. The judgment already rendered between these parties established that the former note was paid by this one. To be valid as a payment it must necessarily have been valid as a note. That it was so had therefore been judicially determined and could not be controverted again.”¹² And thus, where an action of assumpsit was brought against a railroad company, and was defeated by the defense set up that the contract sued on was under its corporate seal, and the corporation was afterward sued in an action of covenant on the same contract, it was held that it could not, in the second suit, deny that the contract had been duly sealed by it as its deed.¹³

SEC. 221. On like principle it has been held in New York that where two notes are given on a single consideration, and

¹¹ *Barker v. Cleveland*, 19 Mich., 235.

¹² *Hooker v. Hubbard*, 102 Mass., 242.

¹³ *Philadelphia etc. R. R. Co. v. Howard*, 13 How., 307.

suit is brought on one of them, and facts are put in issue which, if true, must necessarily affect both notes alike, the verdict and judgment thereon may be set up in bar of an action on the other note, or on a correlative action depending on the character and validity of the note. So where the maker of a note paid it and brought an action against the indorser to recover the amount he had paid on the ground that it was money paid for the indorser's use, and that the note and another note were executed at the indorser's request for the special purpose of enabling the indorser to raise money, and on his agreement to pay it at maturity, and in the action, the plaintiff gave evidence to prove that the two notes were given under the same arrangement, and on the same consideration, the defendant may set up a judgment obtained in a suit on the other note by the indorser against the maker, wherein the same allegations were set up as a defense without success, the indorser obtaining a verdict and judgment thereon.¹⁴ The rule also applies to railroad bonds, etc., that is, a decision on one will conclude all of the same issue. We will have occasion to recur to this again.

In Iowa the principle has been extended to a plea of failure of consideration in like cases.¹⁵ But where two promissory notes were executed on the purchase of personal property, and suit being brought on one of them, and the pleas set up were, 1st, Breach of warranty, and 2d, Failure of consideration, it was held that the first plea was *res adjudicata*, and the second not, in a suit on the other note. But the grounds of the distinction are not clearly discernible, as the court say that, if the jury found that there was a failure of consideration in the first action, that finding could only apply to the first note since the second was not in litigation. But why does not this apply likewise to the breach of warranty?¹⁶

SEC. 222. Where there are two issues, one on the merits

¹⁴ *Treadwell v. Stebbins*, 6 Bosw., 538.

¹⁵ *Taylor v. Chambers*, 1 Clarke, 124.

¹⁶ *Clark v. Sammons*, 12 Iowa, 370.

and the other a mere technical one, and a general verdict is rendered, it is held in Vermont that the rule is: "Where a case is submitted to the jury involving two or more issues, with evidence tending to sustain them all, and a general verdict is rendered, such verdict is *prima facie* evidence that all the issues were found in favor of the party for whom the verdict is rendered. And when a judgment on such verdict is presented by the defendants to defeat a recovery in a subsequent suit, brought on the same cause of action, the burden of showing that the verdict in the first suit was rendered upon an issue presenting only a temporary bar, and that such bar has since been removed or has ceased to operate, is thrown upon the plaintiff. If a party against whom a verdict is rendered would avoid this effect of a general verdict, it is incumbent on him to see to it that the jury by their verdict declare upon what issue it is rendered."¹⁷ The rule likewise prevails in Indiana,¹⁸ and New York.¹⁹

SEC. 223. But where an issue was made that the defendant was a trustee by virtue of holding property by a sale fraudulent as to plaintiffs, and also that he was not a trustee because the property with which it was sought to charge him had been taken from his possession and disposed of by attachment against his creditor, and both of these issues being before the court a general decision was rendered that the defendant was not a trustee, the judgment was held not available in a subsequent suit to prove fraud, because it did not appear in any way, on which ground, or whether on both, the judgment rested, and such a question could not be left to conjecture; and, if on the proof it should appear possible that one or the other was not determined, the uncertainty would vitiate the conclusiveness of the former adjudication.²⁰

SEC. 224. If a declaration contains a special count and also

¹⁷ *White v. Simonds*, 33 Vt., 180.

¹⁸ *Day v. Vallette*, 25 Ind., 43.

¹⁹ *Agate v. Richards*, 5 Bosw., 456.

²⁰ *Aiken v. Peck*, 22 Vt., 260.

the common counts, and it does not appear on which counts the judgment was rendered, it cannot be made available in a subsequent suit to establish the validity or even the existence of the contract set forth in the special count.²¹ And even the highest probability will not supply the place of definiteness and certainty. What a jury *must* have found may avail, but not what they may have found.²² The inference must be necessary and irresistible, excluding all doubt.²³

²¹ *Packet Company v. Sickles*, 24 How., 333.

²² 2 Smith's Leading Cases, H. & W.'s notes, 794.

²³ *Chamberlain v. Gaillard*, 26 Ala., 510.

CHAPTER XVIII.

MATERIALITY OF THE ISSUE.

Section 225. Test of Materiality.

226. Must be Points on which the Decision Turned, of Necessity.

227. Not Sufficient that a Court professes to find a Particular Issue, if this is Immaterial.

SECTION 225. The rule requiring the issue to be material does not merely stand against frivolous matters, but against introducing and establishing matters which, though material in themselves, are nevertheless irrelevant to the controversy in hand, and are therefore merely immaterial with reference to the case. The test is, the sufficiency of the matter to uphold the judgment or decree,¹ and its essential character as to the rendering thereof.² The Pennsylvania court says as to this matter: "The pleas also aver, and with truth, as the jury have found, that on the trial of the *scire facias* it became a question whether the allegations which the plaintiff makes in this suit were founded in fact. But this question was not the direct subject-matter of adjudication. If made at all, as for the purposes of this case it must be treated as having been, it could at most have been only incidentally. The form of the writ and the plea *nulla bona* settle so much. Then what matters it that the questions were made on that trial? If they were only incidentally made, if their decision was not essential to the judgment, and especially if they were immaterial questions, no case rules that they can no longer be controverted.³ And it is noteworthy that the special pleas, whilst setting out

¹ *Coit v. Tracy*, 8 Conn., 276.

² *Toms v. Lewis*, 42 Pa. St., 411.

the attachment execution, do not aver that the questions which they allege to have been made on the trial were material to the controversy then existing between the parties, or that their decision was essential to the judgment." The decision of an immaterial point should not prevent a determination upon the merits. Thus a gratuitous decision of a question of fraud, having no effect when rendered, can have none afterward, and cannot supplant another inquiry on the same point when this becomes necessary.³

SEC. 226. In a libel for a divorce in Massachusetts, on the ground of cruelty and desertion, the libelee denied the charges, and also set up in defense a divorce he had previously obtained in the State of Indiana, in a court of competent jurisdiction. The libellant replied by attempting to impeach this divorce on the grounds that he was not a citizen of Indiana when he obtained it, but went thither purposely to obtain it. On these questions special issues were formed, and findings on each by the jury were in favor of the libelee, and a general verdict was found in his favor thereon, and exceptions were taken by the libellant; on which the court equally divided. In a subsequent action against the libelee for the board of the libelant, subsequent to the Indiana divorce, it was held that the former proceedings did not establish the validity of that divorce, and that the plaintiff could impeach it. The court said: "The ground taken by the defendant is, that a general verdict and judgment are conclusive in favor of the prevailing party as to all issues actually involved in the trial, upon which any evidence was offered, and which were submitted to the jury, although it may not appear that they were the very points on which the decision turned, and it may be doubtful in favor of which party any one of them was found, and even whether as to all of them the jury came to any conclusion. Such, however, is not, in our opinion, the true doctrine of the law. A verdict and judgment are conclusive only as to those facts which were necessarily involved in them, without the exist-

³ *Hibshman v. Dulleban*, 4 Watts, 192.

ence and proof or admission of which such a verdict and judgment could not have been rendered. An estoppel is an admission or determination,* under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterward drawn in question between the same parties or their privies. An estoppel by verdict and judgment is founded on the principle of the maxim, *Interest reipublicæ ut sit finis litium*. And the true limits of the doctrine are accurately stated in another maxim, *Nemo debit vis vexari si constet curiaæ quod sit pro una et eadem causa*. When a fact has been once determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps,† or the ground work upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, ‘upon the obvious principle that where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. But such an inference must be inevitable or it cannot be drawn. These we understand to be the limitations of the rule according to all the well considered authorities, ancient and modern.’⁴ And the Connecticut court, in a comparatively recent case, said that “A judgment is co-extensive only with the issue upon which it is founded, and conclusive only upon the matters necessarily involved and included within that issue;”⁵ and which must have been found to warrant the issue.⁶

* I do not accede to this definition of an estoppel; but no matter.

† Herein differing altogether from *King v. Chase, supra*.

⁴ *Burlen v. Shannon*, 99 Mass., 202.

⁵ *Dickinson v. Hayes*, 31 Conn., 423.

⁶ *Church v. Chapin*, 35 Vt., 231.

SEC. 227. The New York court has held that even if the judgment professes, in express terms, to affirm a particular fact, yet if such fact were not material to the issue, and the cont. did not actually turn on it, the parties will not there ebarred from litigating the fact anew in a subsequen ; since it is a "familiar principle that a judgment conc. e parties only as to the grounds covered by it, and the facts necessary to uphold it."⁷

This may suffice for the present as to the materiality of issues involved in the first action.

⁷ *People v. Johnson*, 38 N. Y., 65; *Woodgate v. Fleet*, 44 N. Y., 13.

CHAPTER XIX.

INDIVISIBILITY OF THE ISSUE.

Section 228. Action not to be Split up.

- 229. Illustration in an Action for Flooding Lands.
- 230. Entirety as to Torts.
- 231. Grounds of the Rule of Entirety.
- 232. Applies to Conditional Agreements.
- 233. When Applies to Installments.
- 234. When Not.
- 235. Effect of Error in computing Interests or including Costs.
- 236. Running Account.
- 237. Indefinite Contract.
- 238. Contract of Indorser.
- 239. Explanation of rule as to Torts.
- 240. Explanation as to Contracts by Pennsylvania Court.
- 241. The same by New York Court.
- 242. Negotiable Note on Settlement.
- 243. Non-fulfillment of Contract.
- 244. Contract and Tort in same Transaction.
- 245. Subsequent Breaches.
- 246. Continuing Injury.
- 247. Continuing Imprisonment.

SECTION 228. Contestants are not allowed to split up a cause of action, even where they have an election of different remedies, into different actions, or to supplement an incomplete remedy they may have selected at the first by availing themselves subsequently of another. Thus, where a creditor had wrongfully converted a pledge placed in his hands by his debtor, the court said: "The improper application of the

pledge gave the plaintiff the right to reclaim it in several forms of action; but he cannot sue for the price received for a part of them, and for the other part in kind, or for damages for the wrongful conversion of it. * * * * *

If he did not recover enough, the fault was the adoption of an incomplete remedy, or in the result of it, and he cannot sue again. The record of the first proceeding is necessarily conclusive that he had received then the full amount, whatever may be the fact; and he could have no pretense of right to recover now for more than the value of what remained unsold. But the rule that prevents him from splitting up his cause of action into several fragments takes away his right of action for the residue entirely. Having once claimed, by action or defense, a part of an undivided subject-matter, the law allows him no remedy for the other part, else there would be no limit to litigation.”¹

SEC. 229. Thus, a plaintiff brought an action for flooding his lands by means of a dam towards the west and south. On a plea of not guilty, a general verdict was rendered for the plaintiff. A second action was brought for the injury done since the first suit was instituted. On the trial of the second suit, the defendant offered to prove a *parol license* from the plaintiff to flow back the water over the west line of the plaintiff’s land, and also that by a written agreement with the plaintiff he had a right to dig a ditch to protect that portion of the plaintiff’s land lying towards the south, that this ditch was not completed at the time of the first trial, but that at the time the second suit was brought the ditch was completed — this evidence being offered for the purpose of showing that the verdict in the former suit was rendered on account of the injury done to the plaintiff’s land lying towards the south, and because of the unfinished condition of the ditch. It was held he could not avail himself of such evidence, because of the indivisibility of the issue in the former cause — a principle which, of course, applies to defendants as well as plaintiffs.

¹ *Simes v. Zane*, 24 Pa. St., 243.

The court said: "There is no rule of legal practice of higher value than that which arrests the strife of litigation by declaring that one suit and judgment therein is an end of controversy, as to all matters put in issue, and which ought to have been put in issue. And the present case illustrates the wisdom and necessity of the rule, as well for the protection of the public against the expense and trouble of repeated litigation, as to save the parties from the ruinous consequences of indulging the thought of being avenged for one defeat by a renewal of the contest. The annual damage in this case is about four dollars, and for this the parties have had one concluded action and a trial in another, and if there is not some virtue in the rule just adverted to, it is very probable that the exhaustion of one of them will alone be effectual to terminate the strife. The rule is both just and beneficent, even though it sometimes happens that the former judgment was erroneous. Its errors must be joined to those other innumerable ones that necessarily arise from human fallibility. The former action was substantially for a wrongful flooding of the plaintiff's land by means of a dam erected and continued on the land of the defendant. The plea was not guilty, and on a general verdict for the plaintiff judgment was entered in his favor. This action recites, and is founded upon, the former judgment, and avers a continuance of the nuisance, and to this the plea is not guilty, the only meaning of which here is that the defendant had not continued the nuisance charged and found in the former action. The essence of the charge in that action is that the defendant had no right to maintain his dam so as to flood the plaintiff's land, or any part of it, and this charge appears to be sustained by the judgment.

"But now the defendant alleges that there was then a flooding at the south, and also at the west, and that though the right at both points was in controversy, and was submitted to the jury, yet the verdict applies to only one of them, and the jury in the present case were directed to inquire whether this was so. If such an inquiry is proper, then it is not easy to see how one judgment can ever be conclusive in an action of

nuisance, or in any other action. As well might it be said of a suit on several promissory notes of \$100 each, with a recovery of only \$100, that the verdict applies to only one of them, and allows the plaintiff to sue again on the others. But we need no better illustration of the difficulty than this case affords. It is assumed to be doubtful whether the former verdict finds a nuisance on the west, or on the south, or on both, and it is left to this jury to decide how this is. They decide in favor of the defendant, which means that the former verdict did not apply to both sides, and that the defendant still has the right to flood one or other of them, but which of them no one can tell. We have now, therefore, two judgments, both inconclusive, and therefore the strife may still go on; this cannot be; the judgment must, if possible, be conclusive of something; what that something is must be defined, not by guessing at the intention of the jury, but by the matters in dispute, and the verdict which decides them. The pleadings show that the matter in dispute was the wrongful flooding of the plaintiff's land, and that is decided in his favor. The evidence must show what land, and it does show that on the trial the defendant asserted a right to flood a part of the land, and submitted the evidence of his right to the jury, and of course they decided it. How? There is no verdict in his favor, but a general one against him. The inference is inevitable that his claim was found against him, for he might have asked by plea, or otherwise, that they should find this fact specially, and he ought to have done so, and then, also, it would have been conclusive for or against him. It was found one way or the other, and the conclusive presumption is that the verdict shows which way. In an issue on a declaration or plea founded on a former judgment, the only proper subject to be submitted to a jury is whether or not the matter in dispute in the present action is the same that was litigated in the former one. With this fact found, the court must decide upon the effect of the former judgment.”²

² *Rockwell v. Langley*, 19 Pa. St., 508.

SEC. 230. The rule of indivisibility applies to torts as well as contracts. In a case of trespass brought for seizing goods under an attachment, the New York court said: "Upon the main question of this cause, we are clearly of opinion that the judgment in the first suit was a bar to the plaintiff's claim in this action. The only evidence of a conversion was the tortious taking under the attachment. The seizure of the bed and the bed quilts which then lay on the bed was one single indivisible act, and the plaintiff ought not to be permitted to vex the defendants by splitting up his claim for damages into separate suits for each article so seized. There is no difference, in this respect, between the actions of trover and trespass. In *Smith v. Jones* (*ante.*, p. 229), the court decided that where goods were sold at one time on an entire contract, the vendor could not maintain separate suits for separate parcels of the goods so sold and delivered. There is no reason for a difference in the rule between torts and contracts. Suppose a trespass or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?"³

SEC. 231. But the various items must be connected with the same transaction, and so, where suit was brought for labor performed on a certain day, it was held not to debar an action for labor performed before that day. The court say: "There is no case or *dictum*, which requires the party to join in one suit several and distinct causes of action. It is true the court may, to prevent vexation and cost, consolidate, under some circumstances, several suits brought and pending at the same time. It is in the election of the plaintiff, if he has distinct causes of action, to sue upon all or any of them when he pleases; and he has the further election to unite in one suit, under certain restrictions not now necessary to be stated, several causes of action, but the defendant cannot compel him to do this. If, then, the plaintiff is not bound to unite in one suit two distinct causes of action, and if he has a right to elect

³ *Fulton v. Mathews*, 15 Johns., 432.

to proceed by separate suits, and obtain judgment on one of his causes of action, upon what principle is it that he shall lose his deferred cause of action merely because it resembles the one on which he has obtained judgment? The law is not so inconsistent in its provisions, nor indeed so unjust, as to deny to the party the means and the right of showing that although there is a resemblance between the causes of action, and they belong to the same family, yet that there is not an identity, but that in truth they are distinct and different."⁴

SEC. 232. That a contract is conditional does not prevent it from being regarded as indivisible, where the condition is fulfilled, as where one agreed to sell another three tons of hay "if he had so much to spare." Part of the hay was sued for in attachment, and a recovery had, and afterward, the purchaser bringing an action for labor, the seller was allowed by the court to set-off the remainder of the hay. On appeal, however, it was held that he could not have brought another separate action for the balance of the hay, and therefore he could not set it off against the purchaser's claim in suit against him.⁵ But a contract may contain a variety of distinct and independent stipulations, which will render it as divisible as if there were as many contracts as there are such provisions.⁶ If a contract will admit of two alternative constructions, the plaintiff by electing one debars himself from the other.⁷ And where labor is performed at different times, but under an entire contract, and there is a recovery in one suit upon the contract, a second action cannot be maintained, even on clear proof that in the first action no evidence was given on a part of the demand in controversy. Neither will a formal withdrawal of an item from the consideration of the jury, and a formal entry of such withdrawal on the record, allow a subsequent suit to be brought on such item.⁸ But

⁴ *Phillips v. Berick*, 16 Johns., 140.

⁵ *Jackson v. Colver*, 16 Johns., 487.

⁶ *Robinson v. Crowninshield*, 1 N. H., 77.

⁷ *Bickford v. Cooper*, 41 Pa. St., 146.

⁸ *Logan v. Caffrey*, 30 Pa. St., 196.

items arising out of separate sales, at different dates, are separable, and if a part were sued on and paid, and the suit discontinued without judgment, and then another suit is brought on the same kind of an article, there is no bar, 1, because there was no judgment in the first suit, and 2, because the sales were separate.⁹ And even where a contract is entire, and is sued upon, a voluntary compromise and satisfaction of a part do not necessarily merge the whole demand, but may work a severance, or not, according to circumstances.¹⁰

SEC. 233. As to installments, the rule has already been stated to be that where there are two or more promissory notes (or bonds) executed as part of the same transaction, so that what affects one must affect the other in like manner, an adjudication upon one will determine that upon the other — and this applies to defenses, as where a suit has been brought on the first of two notes given for installments of purchase money of real estate, and judgment is rendered for the plaintiff on a particular defense, that defense is not thereafter available in a suit on the other note.¹¹ And, on like principle, it has been held that where a suit is brought for an installment of interest due on a promissory note, and the maker unsuccessfully sets up a plea that the note had been fraudulently altered so as to bear interest from date, this judgment will be conclusive against the maker as to the fraudulent alteration in a subsequent suit for the entire amount of the note.¹²

SEC. 234. If a contract provides for payment by installments, due at different times, the installments may, of course, be successively sued on as they become payable.¹³

SEC. 235. But if one recovers judgment for the amount of a promissory note, he cannot sue again upon the same cause of action on the ground of an error in computing the interest on it.¹⁴ And so, if on an indemnity bond, whereon a plaintiff

⁹ *Cushman v. Bean*, 2 Hilt., 340.

¹⁰ *O'Beirne v. Lloyd*, 43 N. Y., 248.

¹¹ *French v. Howard*, 14 Ind., 455.

¹² *Edzell v. Sigerson*, 26 Mo., 583.

¹³ *Armfield v. Nash*, 31 Miss., 361.

¹⁴ *Wickersham v. Wheedon*, 33 Mo., 561.

may properly recover not only the amount he has actually expended in the defense of an action against him by a claimant of the property concerning which the bond was given, but also costs and counsel fees, which have not been actually paid, the referee, by mistake, fails to include such costs and counsel fees, which are therefore not included in the judgment, the plaintiff cannot sue again on the bond to recover those costs and counsel fees.¹⁵

SEC. 236. It has been decided, in New York, that where an account of articles delivered on different days is all due, it is an indivisible claim;¹⁶ the principle being that a current account, all due, makes but one entire contract.¹⁷ And it is extended to past breaches of any contract — the case of *Badger v. Titcomb*, 15 Pick., 409, being directly apposite, but, in this, running counter to the great weight of authority as the court in the case just above cited conclusively shows, in criticising the Massachusetts case.

SEC. 237. Where the captain of a steamboat hired a barge "for ten dollars per day until delivered back in Cincinnati in like good order as received," but no time of return or payment was specified, these points were held: 1. That the return of the barge was to be in a reasonable time, under the circumstances of the hiring; 2. That the amount due would be payable on the return; 3. That the contract was entire and not divisible; and 4. That a recovery in an action brought thereon, after such reasonable time, for the amount then due under the contract, would bar a subsequent action for the amount of hire accruing after the period embraced by the first judgment.¹⁸

SEC. 238. Where a negotiable promissory note is indorsed in blank for the accommodation of the maker, the contract of the indorser is single and entire, and the holder cannot so fill

¹⁵ *Bancroft v. Winspear*, 44 Barb., 209, overruling *Scott v. Tyler*, 14 Barb., 202.

¹⁶ *Guernsey v. Carver*, 8 Wend., 492.

¹⁷ *Bendernoyle v. Cocks*, 19 Wend., 208, and cases cited.

¹⁸ *Stein v. Steamboat*, 17 Ohio St., 471.

up the indorsement as to make the note part payable to one person, and part to another, without the consent of the parties to the note. And where the makers of a note thus indorsed delivered it to a party as security for a note for a less sum given by them, and between the makers and a second party it was afterward agreed that the note should also be held by the first party as security for a note of the makers to such second party, a judgment recovered against the indorsers by the first party for the amount due on his note, without including the amount due on that of the second party, merges the contract of indorsement, and such second party cannot maintain an action thereon against the indorsers for the amount for which it was so held as security for him. The contract being entire, it was not a part only of the note merged in the judgment, but all of it¹⁹—as Justice STORY forcibly said, in a certain case, as to an indorser: “He has the right to stand upon the single of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons.”²⁰

Sec. 239. The principle of indivisibility extends to torts, as well as to contracts. And while it may sometimes be allowed a plaintiff to bring two separate actions at one time for different chattels taken by one trespass, yet a verdict and judgment in one will bar the other. And where, in such a case, the second action (both pending at once) was tried while the jury were consulting on the first—neither action pleaded in abatement of the other—and the second resulted in a verdict for the defendant, although the first resulted in a verdict for the plaintiff, it was held the plaintiff’s exceptions in the second case must be overruled, because the verdict in the second, returned before that in the first, barred the later verdict.²¹

On like principle, where damages were assessed in an action

¹⁹ *Erwin v. Lynn*, 16 Ohio St., 547.

²⁰ *Mandeville v. Welch*, 5 Wheat., 277.

²¹ *Marble v. Keyes*, 9 Grey, 221.

against a railroad company for the destruction of a building by fire, resulting from the sparks of a locomotive, and judgment entered thereon, this was held to be a bar to a subsequent action for the destruction of other buildings which were fired by the burning of the first—and that, too, although the second suit was prosecuted for the benefit of an insurance company who had paid the loss on these other buildings.²²

And where various trespasses are set forth in a single count of the declaration, accompanied by a statement of various particular injurious acts, and judgment is rendered for a portion of those acts, this will bar any subsequent action for others of such acts.²³ And the result is the same where there are two counts—either in contract or tort—on which evidence is offered, and the jury find on one count but say nothing as to the other, if the plaintiff accepts the verdict and takes judgment thereon.²⁴

And where a father brings an action on the case to recover damages resulting to himself by an injury to a minor child, and the recovery is limited to damages accruing prior to the commencement of the suit, this will bar a second action brought expressly for subsequent loss of services and other damages developed after the first suit was instituted.²⁵ This is upon the ground that all the consequences are but the unavoidable result of a single act, and this case, therefore, differs from the voluntary continuance of injuries, which will engage our attention before we close the present chapter.

SEC. 240. The Pennsylvania court has explained this matter as pertaining to contracts, very clearly, thus: "But what is an entire and what a divisible contract? By the Roman law, when several persons contracted an obligation jointly, each was only liable for his own part unless it was particularly stipulated that they should be bound *in solido*; and when a person died leaving several heirs, each heir was only answer-

²² *Trask v. R. R.*, 2 Allen, 331.

²³ *Goodrich v. Yale*, 8 Allen, 454.

²⁴ *Shaw v. Barnhart*, 17 Ind., 185.

²⁵ *Adm'r v. Clarendon*, 18 Vt., 253.

able for his own portion. So, when an obligation was contracted in favor of several persons, or devolved upon several heirs of one person, each was creditor for his respective part, provided the obligation could, from its nature, be discharged in several parts. Debts, which might be so discharged in separate portions by the several debtors to the several creditors, were called divisible; those which only admitted of an entire discharge were indivisible. 1 Pothier Ob., 171, *in notis*. Not to embarrass ourselves with the many curious metaphysical distinctions which abound in the Roman law on this subject, it is sufficient for the present case to say that an obligation to pay a fixed price for work and labor already rendered is *unum debitum*, and indivisible. Not that payment cannot be made in parts, but, without a stipulation to that effect, nothing less than entire payment will discharge the debt, or any part of it. If parties contract that a debt shall fall due and be payable in installments, they have severed it, and we have seen that a recovery of one installment, even under a declaration which counts for the whole debt, does not bar a subsequent suit for an installment not due when the first suit was brought; 3 W. & S. 143; so, where the consideration is to be rendered in parts, partial payments may be enforced without involving the whole debt; but where the consideration is fully executed, and there is no stipulation of severance, the obligation to pay is indivisible and entire, as much so as an obligation to build a house, to make a statue, or to paint a picture. And the entirety of the contract has regard to the obligation of the defendant, for it is upon that the action is founded. But if we look at the contract on the part of the plaintiff, what is it? Under the evidence, it is that he would serve the defendant as a farm hand at the rate of one dollar a day. The answer to the bill of discovery alleges various hirings at different prices, but the evidence is not so. Can a hireling, then, after periods of service under such a contract, bring separate suits for each day he wrought? As well might the shopman bring separate suits for the tea, coffee and sugar sold his customer, or for the packages delivered each day that the account was running.

Such multiplicity of actions would not be tolerated. And after a judgment in one action it would bar the subsequent action, because the evidence, had it been given in the first, would have been equally available as in the last to entitle the plaintiff to recover.”²⁶

SEC. 241. The New York Court of Appeals say, on the same subject, in the way of general explanation, with equal clearness: “It is entire claims only which cannot be divided within this rule: those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued on separately. It makes no difference that the causes of action might be united in a single suit; the right of the party, in whose favor they exist, to separate suits, is not affected by that circumstance, except that, in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions. It is not, as will be seen by the cases, always easy to determine whether separate items of claim constitute a single or separate cause of action, and this difficulty, connected with neglect, in some instances, of proper attention to the principle of the rule under consideration, has led to some loose expressions and confusion in the books on this subject. * *

“The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to

²⁶ *Logan v. Caffrey*, 30 Pa. St., 200.

one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass or conversion or fraud gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations, to be performed at different times, is no exception; although an action may be maintained upon each stipulation as it is broken before the time for the performance of the others; the ground of action is the stipulation, which is in the nature of a several contract. Where there is an account for goods sold, or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist will, in each case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and, usually, in the case of a running account, it may fairly be implied that it is in pursuance of an agreement that an account may be opened and continued either for a definite period, or at the pleasure of one or both of the parties. But there must either be an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, indivisible. Applying this test to the present case, it is very clear that the two accounts did not constitute an entire claim; but, on the contrary, that they were several and formed two several causes of action. The business of the plaintiff consisted of two branches, which were designed to be and were kept entirely distinct, in each of which one of the accounts was made, and an arrangement was entered into under which one of the accounts arose anterior to the opening of the other account. Here was no express contract connecting the two accounts, and the facts, instead of warranting the presumption

of such a contract, show that separate agreements only, one in regard to each account, were intended.²⁷

SEC. 242. Where a negotiable note has been given in settlement of an account, and subsequently a judgment is obtained on the account, and the attorney collecting the judgment compromises it at a much less sum than the judgment calls for, and it is satisfied thereon, the original creditor cannot maintain an action, either on the note or the judgment.²⁸

SEC. 243. An agreement between A and B was, that A would deliver B all the lumber made at his mills within a certain time; and at the execution of the agreement B paid A \$100. On failure to deliver, B brought suit on the contract and recovered damages, and afterward brought another suit to recover the \$100 as money paid for the other's use, or had and received. But he was held debarred by the first suit from bringing the second on the principle that "when a party brings a suit upon a contract, he affirms it, and must seek his remedy under it for every right which the contract secures to him, and which has been withheld by the other party. The contract, when thus affirmed, constitutes an indivisible claim to indemnity, which cannot be divided into several claims, and a part recovered in one action and a part in another."²⁹ The plaintiff, however, might have brought suit in the first instance for the money paid by electing to ignore the existence of the agreement because the other party had acted as if there were none existing by a total non-compliance with its stipulations.

SEC. 244. But a contract and a tort connected therewith are distinct, so as not to require blending. For example, where one recovered in an action for the hire of a horse, buggy and harness, and afterward sued for injuries done to the buggy and harness during the time the hirer was using them, it was held that he could maintain the second action.³⁰

²⁷ *Secor v. Sturgis*, 16 N. Y., 554, *passim*.

²⁸ *Fogg v. Sanborn*, 48 Me., 432.

²⁹ *Dalton v. Bentley*, 15 Ill., 421.

³⁰ *Shaw v. Beers*, 25 Ala., 449.

SEC. 245. *Subsequent* breaches of a continuing contract may constitute distinct grounds of action; although all *prior* breaches of such a contract must be combined. In such a case nothing but the breach and amount of damages is available as an open question in the second suit, everything else being within the purview of the former suit. Thus, one sold a tavern stand, with the express stipulation, as an inducement to the purchaser, that he would discontinue tavern keeping in the vicinity at his residence; but yet he would occasionally entertain travelers for hire. This was held to be a breach — the plaintiff having prepared himself previously for keeping the house — and the plaintiff could recover for it without proving special damage. And a second action being brought for a separate breach, it was decided that the defendant was precluded from setting up the plea that the plaintiff was not prepared to keep the house, and could dispute nothing but the subsequent breach and the damage thereon — every other point falling within the compass of the first suit.³¹

SEC. 246. The subject of continuing injury remains to be considered. The difference between this and subsequent breaches consists mainly in this, that the latter involves separate voluntary acts, the former not — the former is negative, therefore a mere omission; the latter positive, made up of commission. Thus, a party diverting a stream is liable as long as the diversion continues, and in an action for such continuance a former proceeding between the same parties or privies for the diversion concludes the rights of the litigants, even if the former judgment was by confession of the defendant's attorney.³² It has even been held that in the second suit the complaint needs not to refer to the former suit, nor claim damages for *continuance*, although, in every case, the damages must be limited to such as occurred since the former action.³³ However, in Pennsylvania, the plaintiff must declare for the

³¹ *Heicew v. Hamilton*, 4 G. Greene (Iowa), 317.

³² *Schock v. Foreman*, 3 Brewst., 157.

³³ *Beckwith v. Griswold*, 29 Barb., 291.

continuance,³⁴ a doctrine much more in consonance with the rules of pleading in regard to the certainty of the issue. And it is settled that in an action for a continuance it is no defense to say that the nuisance was erected on the land of a third person, so that the defendant could not abate it without committing a trespass, which the law would not compel him to do. Thus, in an English case, several were sued for continuing a nuisance erected on land belonging to the corporation of Kendall, and they contended that they were not responsible for the continuance, because they were distinct persons from the corporation, and though they were guilty of erecting the building obstructing the way to the plaintiff's market, yet they could not be considered as continuing it because they were not in possession of or interested in the soil on which the building was placed. But the court disposed of this in a very summary way by remarking: "It was also said that the defendants could not now remove the nuisance themselves without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes by showing their inability to remove it without exposing themselves to another action."³⁵ And, in Pennsylvania, the same was held in a case where the defendant had diverted the water from the plaintiff's mill by breaking the bank of a stream on the land of a stranger.³⁶

A suit for continuing injury may extend back of the trial of a former cause to the time of instituting the former suit,³⁷ where damages are not recoverable up to the time of the trial — which is the case, usually.

It is held in Massachusetts, and also in Delaware, that in an action for continuance of a trespass or nuisance the first action

³⁴ *Smith v. Elliott*, 9 Pa. St., 345.

³⁵ *Thompson v. Gibson*, 7 Maelsin & Welsby, 462.

³⁶ *Smith v. Elliott*, 9 Pa. St., 345.

³⁷ *Adams v. Goodrich*, 55 Ga., 233.

does not conclude the question of title, although the judgment therein is admissible on that question as *prima facie* proof.³⁸

SEC. 247. In Massachusetts it has been held that several actions lie for continuance of an illegal imprisonment, so that an action brought during the imprisonment is no bar to a subsequent suit, after it has ceased, for an assault, battery and imprisonment; and if the judgment in the former be pleaded as a bar, a plaintiff might merely assign for the *continuance* of the imprisonment.³⁹ This was in an early case (1820).

³⁸ *Kent v. Gerrish*, 18 Pick., 565; *Richardson v. Boston*, 19 How. (U. S.), 263; *Nivin v. Stevens*, 5 Harr., 272.

³⁹ *Leland v. Marsh*, 16 Mass., 389.

CHAPTER XX.

AS TO WHAT MIGHT HAVE BEEN LITIGATED IN THE FIRST ACTION.

- Section 248. Suits as well as Causes of Action Indivisible—Criticism.
- 249. Rule Explained.
 - 250. Limitations on the Rule.
 - 251. General Principle.
 - 252. How Determined.
 - 253. Applies either to Action or Defense.
 - 254. Example in Title Suit.
 - 255. Necessity of the Rule.
 - 256. Rule as to Defense of Usury.
 - 257. As to Plaintiff's Mistake alone.
 - 258. Replevin.
 - 259. Different capacities of Party Litigant.
 - 260. Alleged Fraud.
 - 261. Ejectment.
 - 262. Judgment for Purchase Note as to Breach of Bond for Title.
 - 263. Eminent Domain Proceedings.
 - 264. Rule peculiarly prevails in Equity.
 - 265. Action to Quiet Title.
 - 266. Equity Interference—All Reasons must be Urged.
 - 267. Defense of Payment.
 - 268. Cross-claims or Set-offs.
 - 269. Set-offs under Compromise Agreement.
 - 270. Plaintiff allowing Set-offs on Default.
 - 271. Amount not Due and therefore Disallowed.
 - 272. Inadmissible Set-offs Actually Litigated.
 - 273. Set-offs not Divisible.
 - 274. Recoupment.

Section 275. Election to bring Separate Action by Defendant.

- 276. Unliquidated Damages on quantum meruit and on Definite Contract.**
- 277. Rule as to Malpractice and Recoupment.**
- 278. Equitable Defenses Rejected at Law.**
- 279. Rule Rigidly Applied as to Set-off or Recoupment in Damage Suits.**
- 280. Connecticut Rule an Exception to the General Rule herein.**
- 281. Plaintiff Declining to Submit after Applying for Non-suit.**

THERE has been much dispute—which, to a degree, still continues—as to how far parties are debarred from setting up, in a subsequent action, matters which they might have urged in the former action, but failed to do so with fair and full opportunity by reason of negligence or unskillfulness. This will claim our attention in the present chapter. And it will be found to rest somewhat on the principle considered in the last chapter.

SECTION 248. Indeed, it seems to be as necessary to hold that actions themselves should be held indivisible as that the causes of action should be. And it seems that Justice MILLER, in his dissenting opinion in *Aurora City v. West*,¹ spoke somewhat unadvisedly when he said: “It is true that some of the earlier cases speak as if everything which might have been decided in the first suit must be considered concluded by that suit. But this is not the doctrine of the courts of the present day, and no court has given more emphatic expression to the modern rule than this. That rule is, that when a former judgment is relied on, it must appear by the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided. This is expressly ruled no less than three times within the past eight years by this court, to-wit: in *The Steam Packet Co. v. Sickles* (24 How., 333); *Same v. Same* (5 Wall., 580); *Miles v. Caldwell* (2 Wall., 35).”

I think we shall find no material changes in the application of the rule, and probably fewer exceptions than formerly.

¹ 7 Wall., 106.

There may be some relaxation proportionate to the relaxation of the strictness of pleading latterly. But the weight of authority, I think, even till the present day, is very decidedly in favor of upholding the rule compelling a unity of action, and prohibiting a splitting up of causes. This assertion seems altogether justified by the fact that in the very case wherein Justice MILLER enters his protest all the Justices except himself united in affirming the rule in this emphatic language: "Courts of justice, in stating the rule, do not always employ the same language, but where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such a case is conclusive between the parties. Except in special cases the plea of *res judicata*, says Taylor, applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time." And, also, they held that as to matters actually determined the conclusiveness extends to every material allegation or statement which is made on one side and denied on the other; which is carrying the rule a great length, and seems to obliterate the distinction between issues of the cause and issues of the evidence.

And as to the prior decisions cited in support of the dissenting voice of the learned justice, I do not find the rule therein condemned in any way, directly or indirectly. In the first cited the court say: "The record produced by the plaintiffs showed that the first suit was brought apparently [not certainly] upon the same contract as the second, and that the existence and validity of that contract might have been litigated"—that is to say, perhaps was litigated. This was not a matter of a certain basis of action and a failure to litigate something which appropriately belonged to it, but it was a case of uncertainty as to whether the former action rested on

a particular contract or not, and consequently whether that contract was passed on or not; it might have been or might not have been either way; dependent on the fact whether the litigation had been based on it or not. Such, then, is *The Steam Packet Co. v. Sickels* case (24 How., 333). And the same case in 5 Wallace, 580, does not differ from it in this respect. It involves another rule altogether from that which the learned Justice cites it to condemn — because it merely covers the point of deciding what really was determined by the former action, and the kind of evidence admissible to prove it. Thus the court says: "Some of the jurors in the former trial were permitted to testify as to the particular ground upon which they found the verdict. This testimony was not objected to, and therefore is not available as error here. But it is proper to say that the secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding." Thus, the point was to ascertain what really was decided, which is quite a separate matter from the rule declaring that when one manifestly has failed to litigate all that belonged to a former controversy, he has lost his right of doing so. The other case (2 Wall., 41) condemns the rule that in torts nothing will be held concluded by the verdict which was not put directly in issue by the pleadings. And I find nothing further in it, in this direction; and this is in favor of the rule Justice MILLER condemns, that is, so far as it goes, notwithstanding he himself delivered the opinion in that case. Moreover, in the same volume of the reports² is another emphatic indorsement of the rule we are considering, the opinion of the court being delivered by Justice SWAYNE. Suit was brought on bonds and coupons issued under a statute of Wisconsin, and for the same purpose; and a prior similar suit, relating to the same issue, was set up against a bill for an injunction to enjoin the holder from proceeding in certain other suits on bonds and coupons of that issue, and compel

² *Beloit v. Morgan*, 7 Wall., 621.

him to surrender the bonds. The court say: "On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities — though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, though the *res* itself may be different. *

* * * * * But the principle reaches further. It extends not only to the questions of fact and of law which were decided in the former suit, but also to the grounds of recovery or defense which might have been but were not presented. In *Henderson v. Henderson*, 3 Hare, 115, the Vice-Chancellor said: 'In trying this question I believe I state the rule of the court correctly that where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of legislation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time.' A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same trans-

action. The judgment at law established conclusively the original validity of the securities described in the bill, and the liability of the town to pay them. Nothing is disclosed in the case which affects this condition of things."

SEC. 249. A late case in Wisconsin (1867) affirms the rule thus: "The rule to be derived from these cases is that the decision of a court of competent jurisdiction, being *res judicata*, is not only conclusive and binding on all other courts of concurrent jurisdiction as to the subject-matter thereby determined, but also as to every other matter which the parties *might* litigate in the case and which they *might* have had decided."³ And in no case can one be heard to complain that a judgment was rendered against him in consequence of his own neglect or unskillfulness in developing the proper issues for the decision of the court.⁴

SEC. 250. There are limitations, however, which we shall notice below. There are some claims, as, for instance, set-offs, and the like, which a party is not always bound to litigate in a pending action. The general rule, then, is in this regard, that when a case is tried and the claim is submitted to the jury or the court it cannot be litigated in a subsequent suit. Even if the pleadings present the claim distinctly, but no testimony is given in support of it, and it is not submitted to the court or jury, it will not be barred unless it is a claim which the party is bound to present and litigate in that suit, when, of course, the rule is imperative that it shall be submitted, or lost.⁵ And, of course, if, after a submission to a jury, a court should illegally withdraw the cause from their consideration, and dismiss it, this usurped authority would not be available to debar another suit on the same cause of action.⁶ It has been likewise held, in Alabama, that in an action on a simple contract, a judgment recovered by the plaintiff in a former action founded on a separate and distinct contract is

³ *Danaher v. Prentiss*, 22 Wis., 316.

⁴ *Ex'rs of Tate v. Hunter*, 3 Strobb. Eq., 139.

⁵ *Burwell v. Knight*, 51 Barb., 269.

⁶ *Bailey v. Knight*, 8 Tex., 61.

not conclusive against the plaintiff, because he might have embraced in that action the demand on which the second suit is brought.⁷

SEC. 251. We set out, then—keeping these limitations in view—upon the principle very broadly stated by the Indiana court, in a quite recent case, quoting prior decisions, that “when a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case.”⁸ And also thus, by the Ohio court, summing up authorities, “when the facts which constitute the cause of action or defense have been between the same parties submitted to the consideration of the court, and passed upon by the court, they cannot again be the proper subjects for an action or defense, unless the finding and judgment of the court are opened up or set aside by proper authority. This principle of law extends still farther in quieting litigation. A party cannot re-litigate matters which he might have interposed but failed to do in a prior action between the same parties or their privies, in reference to the same subject-matter. And if one of the parties failed to introduce matters for the consideration of the court that he might have done, he will be presumed to have waived his right to do so; 30 Iowa, 433; 13 Ohio St., 283; 1 Johns. Cas., 436; 25 Cal., 266. If a party fails to plead a fact he might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proved, the law can afford him no relief. In *Ewing v. Mc Nairy et al.*, 20 Ohio St., 322, the Judge says: ‘By refusing to relieve parties from the consequences of their own neglect, it seeks to make them vigilant and careful. On any other principle there would be no end to an action, and there would

⁷ *R. R. v. Castello*, 50 Ala., 12.

⁸ *Bates v. Spooner*, 45 Ind., 493.

be an end to all vigilance and care in its preparation and trial.' The same principle is settled in numerous authorities. See 3 Comst., 511; 9 Wis., 23; 5 Sanf., 135. I cannot better express this principle of law than to use the words of RADCLIFF, J., in the case of *Le Guen v. Gouverneur et al.*, Johns. Cas., 492. 'The general principle that the judgment or decree of a court possessing competent jurisdiction shall be final as to the subject-matter thereby determined is conceded on both sides, and can admit of no doubt. The principle, however, extends further. It is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. The reasons in favor of this extent of the rule appear to me satisfactory; they are found in the expediency and propriety of silencing the contentions of parties, and of accomplishing the ends of justice by a single and speedy decision of all their rights. It is evidently proper to prescribe some period to controversies of this sort, and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all their claims? This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive; it might tend to unsettle all the determinations of law, and open a door for infinite vexation.'"⁹ The case from which the above extracts are made was one in which a corporation brought the first action against a subscriber to stock, and recovered, and the second action was brought by the subscriber against the corporation to recover back the money paid under the former judgment on the ground that the company had refused or had disabled itself from delivering the stock. It was held that inasmuch as this was a matter which might have been urged in the first action as a defense, the second suit could not be maintained.

SEC. 252. The first step in determining whether the matter

⁹ *Covington etc. Bridge Co. v. Sargent*, 27 Ohio St., 237.

might have been decided in the prior action, is to ascertain whether it was relevant or not, that is, whether it was within the scope of the pleadings. So that when one sets up in a subsequent suit a former judgment, he must show that the matter alleged by the other party either was actually litigated, or that it might have been under the issues,¹⁰ it being only matters involved in the issues that are regarded as *res adjudicata*.¹¹ The New York court has thus laid down the principles relating to the matter: "It has been decided that where by the pleadings a claim or defense was inadmissible, even though litigated, the judgment is no bar to such claim or defense if disallowed. And so, if the claim was withdrawn, or a part of it did not then exist,* or had not accrued, or was inadmissible under the pleadings, though proved to show malice. But where it could have been allowed if the proof had been sufficient, and has been passed upon on the merits, it is barred, whether allowable or not. And it seems that if the matter might have been litigated and decided in the first cause, as a general rule, the judgment will be final, particularly if the subject-matter actually determined or passed upon was a part of the same transaction. And if it does not appear from the record that the verdict or judgment was directly upon the point or matters which are again attempted to be litigated, that may be shown by proof *aliunde*, provided the pleadings would have justified the evidence of those matters, and the verdict and judgment would necessarily have involved their consideration had they been proved."¹² Even the general language of a decree will be restrained to the issue made, and the subject-matter under consideration, when it was rendered.¹³ The principle herein enunciated may be regarded as a just and legitimate corollary from the general rule that issues actually made must be direct and not collateral.

¹⁰ *R. R. v. Watson*, 26 Ind., 52.

¹¹ *Duncan v. Holcomb*, *Ibid.*, 378.

¹² *Bake v. Rand*, 13 Barb., 160, and prior decisions cited.

¹³ *Bonvillian v. Bourg*, 16 La. An., 365.

*Except in chancery where the matter can be availed of by supplemental bill.

SEC. 253. The principle is the same whether the matter which might have been adjudicated in the first suit would have been therein a ground of the action or a defense to the plaintiff's claim. Thus the Illinois court, quoting Bigelow on Estoppels with approval, say: "It follows, also, from the authorities considered, that a valid judgment for the plaintiff sweeps away every defense that should have been raised against the action, and this, too, for the purposes of every subsequent suit, whether founded on the same or a different cause. Nor will equity relieve the defendant from a judgment on any ground of which he should have availed himself in the action at law."¹⁴

SEC. 254. Thus, in a possessory action a defendant is under obligation to plead all the titles under which he claims, and if he fails to do so, and judgment is rendered for the plaintiff, the defendant cannot be allowed in a subsequent suit to set up a title which he omitted to plead before, in order to regain possession. "Where an issue is made between the parties to a suit, each is presumed to advance all the evidence in his power to enable the issue to be determined correctly. If one of the parties neglects, or does not wish to introduce a part of his evidence when it is known to him, the issue cannot, after a final decision, be again opened to enable him to do so. If this were possible litigation would be uselessly continued. If a party has four titles, he could institute in succession four different suits, instead of having the issue of ownership terminated in one suit."¹⁵ This does not conflict with the rule requiring a distinction between matters within the substance of the issue and mere matters of evidence. It means only that a substantial defense must be set up at the first opportunity, and not afterward.

SEC. 255. So, where an action is brought directly on the former judgment, a defendant cannot re-litigate it by setting up anything which he could have interposed in the original suit wherein the judgment was rendered, as, for example,

¹⁴ *Kelly v. Donlin*, 70 Ill., 385.

¹⁵ *Shaffer v. Scuddy*, 14 La. An., 576.

misnomer,¹⁶ or that the judgment, though rendered in the name of the plaintiff on the record, in fact belonged to another who owned the original cause of action on which it was founded, and that, since its rendition, it had been paid to that other person, the real owner.¹⁷ Says the Georgia court, in regard to the necessity of exacting the rule as to all defenses available, in terse and cogent language, "all such defenses become *res judicata*. If a judgment does not settle *these* it settles nothing—it is not only not an end of litigation, but it is not an approximation to the end—there can be no end."¹⁸

SEC. 256. So if one allow judgment to pass against him on an usurious contract without setting up the usury as a defense, he cannot bring a suit afterward to recover back the illegal excess.¹⁹

SEC. 257. And on the other hand, if a plaintiff, by his own mistake and without any fault of the opposite party, takes a judgment by default for a sum less than the amount of his claim, he cannot sue for the remainder. In such case the appellate court said: "As we understand the case made by the original petition, this was an action seeking the correction of a mistake made by the plaintiffs themselves, or their attorney, in taking judgment in a former suit upon the same cause of action. If such be the true reading of the petition, it is quite evident that the court below erred in holding it to be a good petition. By the first action the subject-matter had become *res adjudicata*. The judgment in that action was a bar to any future action unless it could be avoided for some fraud or fault of the defendant; or, at least, for some mutual mistake of the parties. No such fraud or mistake is alleged. The plaintiffs simply seek relief against their own carelessness or that of their attorney, without showing any fault or omission by the adversary party. Such relief the law never administers."²⁰

SEC. 258. When a defendant in replevin is permitted by

¹⁶ *Guinard v. Heysinger*, 15 Ill., 289. ¹⁹ *Footman v. Stetson*, 32 Me., 20.

¹⁷ *Mervine v. Parker*, 18 Ala., 241. ²⁰ *Ewing v. McNairy*, 20 O. St., 321.

¹⁸ *Barksdale v. Green*, 29 Ga., 420.

the state of the pleadings to try the title to the property, and require a return thereof if successful, he is bound to do so and take judgment, should he prevail, for a return of the goods or for their value. And he will not be permitted to forego the remedy at hand and to bring a cross suit on the matter, especially because the rule is one well calculated to do final and complete justice between the parties in the most expeditious and least expensive way.²¹

SEC. 259. In Alabama the principle has been carried so far as to hold that if one loses goods which he owned as an individual, and others which he held as a trustee, in a single trespass, and brings an action for the goods he held as a trustee, this will debar him from another action for his own property, on the ground that both could have been recovered in the first action.²² This, however, would seem to conflict with the general rule that the successive suits must not only be between the same parties, but also between those parties in the same capacity.

SEC. 260. Where one successfully brought an action to recover back money paid to defendant, on the ground of alleged fraud in obtaining the prior judgment, under which the payment was made, the fraud consisting in obtaining judgment both on an account and on a note given in settlement of the account, the appellate court said: "The judgment must be reversed. This was overhauling the first judgment, and attempting to recover back a portion of it on the ground that it was not due, and had been unconscientiously recovered. The allegation of fraud does not alter the nature of the case. It is substantially an action to recover back money improperly awarded by a former judgment, and is precisely the case of *Marriott v. Hampton*, 7 T. R., 269. In that case the defendant had recovered against the plaintiff for goods sold. The plaintiff had paid him for these goods, and taken his receipt, but not being able to find the receipt at the time of the trial judgment went against him and he paid the money again.

²¹ *McKnight v. Dunlap*, 4 Barb., 42.

²² *O'Neal v. Brown*, 21 Ala., 484.

Afterward, finding the receipt, he brought an action to recover it back. Lord KENYON says: 'If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation; otherwise there would be no security for any person.' The case of *Cobb v. Curtiss* (8 Johns., 470) is clearly distinguishable. There the action was founded on an agreement to discontinue the first suit, and the court goes upon the ground that this agreement could not have been set up as a defense. There was nothing to prevent Ames showing upon the first trial that the note included the account. If he was not prepared with his proofs, it was his misfortune. There would indeed be no end to litigation, nor any security to any persons, if actions like this could be sustained."²³

SEC. 261. In Maine it has been held that where an action of ejectment results in favor of the plaintiff, and he takes possession under his judgment, the defendant cannot afterward bring an action to recover personal property in the buildings he had built on the land; because, in the action of ejectment, it was his duty to protect and defend all his rights connected with the premises in controversy.²⁴

SEC. 262. But in Iowa it has been held that a judgment given on a note executed in the purchase of land for which the plaintiff has given a bond for a deed, will not debar the maker of the note from bringing a suit afterward for a breach of the bond, even if such breach had occurred previous to the suit on the note.²⁵ But in this case the breach is in the nature of a cross-claim, of which we shall speak below.

SEC. 263. A confirmation of proceedings under an eminent domain statute has been held not to be an adjudication, as to the effect of such proceedings; and afterward an action may be brought for the recovery of possession of the lands involved, wherein the constitutionality of the statute itself may be questioned. In fact, however, this rests on the ground that on the

²³ *Walker v. Ames*, 2 Cowen, 428. ²⁵ *Fairfield v. McNany*, 37 Iowa, 75.

²⁴ *Doak v. Wiswell*, 33 Me., 356.

confirmation the question of constitutionality could not properly have been determined.²⁶

SEC. 264. It has been decided that not only does the rule prevail in equity, but more particularly so as it is the peculiar province of a court of equity to discourage laches. And so a decree of foreclosure for purchase money of land is conclusive not only of the defenses actually presented and passed on, but of everything affecting the equity of the decree which might have been available in the foreclosure suit; and if such a decree is settled by compromise, and a new note and mortgage given in the compromise on the same land, the defendant cannot, if there is no fraud, in defense of a second foreclosure suit on the new mortgage given, set up any defense that could have been made available in the first, and can only adduce such facts as would entitle him to a bill of review. On such a case the Alabama court say: "The decree of 1867 must be regarded as an adjudication of the rights of the parties as involved in this case. Judgments are not merely final as to the facts actually litigated and decided, but they are usually, except in proceedings directly instituted to reverse them, conclusive evidence of their own rectitude and justice. The principle applies in almost every instance where a suit is brought to be sustained upon allegations which would have constituted proper ground of defense to a previous action between the parties. Observing the distinction between a mere matter of defense and a cross-claim which may or may not be interposed by the defendant, the former action was in the same court of equity, the peculiar province of which is to put an end to litigation. The obligation upon the defendant to put in issue every matter allowed to him is greater in that court than in a court of law. A suit to foreclose a mortgage legitimately puts in issue every reason why the mortgage should not be foreclosed."²⁷

SEC. 265. And in an action to quiet title defendants are not allowed to set up matters which they could previously have

²⁶ *Embry v. Conner*, 3 Comst., 525.

²⁷ *Murrell v. Smith*, 51 Ala., 305.

set up in a similar action.²⁸ Nor any defense which they might have used in a proceeding at law involving the same subject-matter,²⁹ unless, when proper for fraud, accident or mistake, the case is opened up for equity control. And it has even been held that where, during the progress of an equity cause, anything arises which is proper matter for a supplemental bill, it must be brought in, or else be barred, unless the plaintiff can afterward show the omission did not result from his negligence.³⁰ And where, in granting a divorce, an insufficient alimony is decreed, no other court of equity can remedy the deficiency.³¹

SEC. 266. Where even fraud is alleged in obtaining a judgment in a suit at law, equity will not interfere if the party had a knowledge of the fraud in time to avail himself of it in the lawsuit.³² And the rule is the same in regard to the defense of a discharge in bankruptcy. If omitted in law it cannot be used afterward in equity as to the same subject-matter between the same parties;³³ although it is a general rule that where a statute permits but does not require an equitable defense to be set up in a legal action, it may be omitted without compromising the equitable rights of the party therein.³⁴

Not only fraud in the contract but any invalidity whatever in the cause of action must be set up in an original suit at law or lost.³⁵

And in any equitable case, the parties should urge all the reasons in support of their claim or defense, and a case cannot be reopened merely to hear an additional reason within the knowledge of the party at the hearing, since a party cannot have his cause adjudicated piecemeal.³⁶ As where the right

²⁸ *Hackworth v. Zollars*, 30 Iowa, 436.

²⁹ *Dalter v. Lane*, 13 Iowa, 542.

³⁰ *Hites v. Irving's Adm'r*, 13 Ohio St., 288.

³¹ *Fischli v. Fischli*, 1 Blackf., 360.

³² *Le Guen v. Gouverneur*, 1 Johns. Cas., 436.

³³ *Marsh v. Mandeville*, 28 Miss., 128.

³⁴ *Dorsey v. Reese*, 14 B. Mon., 157.

³⁵ *Hatch v. Garza*, 22 Tex., 177.

³⁶ *Rogers v. Higgins*, 57 Ill., 247.

of parties to a judicial mortgage is the question, that issue must involve the whole or any partial interest in the mortgage. And if there is a neglect to avail himself of any question properly involved, a party cannot employ it to pursue the litigation further.” And where the interests of heirs are involved in a contest as to the validity of an administrator’s sale of real estate, the principle applies.³⁷

SEC. 267. There appears to be some conflict of authority as to the defense of payment, under the rule; some holding it to be an exception and others holding the reverse.

In New York, where one under a proceeding to enforce a mechanic’s lien obtained a judgment for the full claim by default, without giving credit for the amount of a receipt and order which the defendant had paid him, it was held that the defendant could afterward sue for the amounts thus paid, and this was said to be on the ground that the plaintiff never had been guilty of a breach of good faith, and so of a betrayal of the confidence and trust which the defendant reposed in him, and had a right to repose in him; and that it would be unreasonable to require a defendant to appear in the action and employ counsel at his own expense merely to see that the plaintiff would do his duty as to allowing due credits for payments actually made.³⁸ The same was held in a Massachusetts case where payment had been made on a promissory note, but not indorsed thereon—a receipt being taken for the payment. And PARKER, Ch. J., thus explains the apparently exceptional character of the ruling: “Our first impression was against this action; but upon further consideration we think it can be maintained. It is not like the cases in which after judgment suffered, an action is brought to recover back the sum or a part of it which was the foundation of the judgment. In those cases a new trial is the only proper remedy; and when there has been any mistake or accident, our statute furnishes relief. Here the creditor by his own fault

³⁷ *Stockton v. Ford*, 18 How. (U. S.), 420.. ³⁹ *Smith & Weeks*, 26 Barb., 468

³⁸ *Kelley v. Donlin*, 70 Ill., 385.

recovered judgment for his whole debt, when a part of it had been paid. It was his duty to have credited the sum paid on the note; and not having done it, he is to be considered as retaining the money for the use of his debtor. The debtor might well lie by and suffer judgment to go against him by default, relying upon a deduction of the sum paid before judgment. The case of *Fowler v. Shearer* cannot be distinguished from this, for in that as well as this the plaintiff might have given evidence of his payment, but he confided in the attorney that the sum paid should be indorsed on the note. In the case of *Marriott v. Hampton*, the plaintiff brought his action to recover the money paid under legal process, which was thought dangerous. In the case before us there is no such technical difficulty. It is not attempted to disturb the judgment; it is not complained of; it is not alleged that too much has been recovered. The ground of the action is that the defendant has received fifty dollars of the plaintiff which he is not entitled to retain. He might have retained it if he had chosen to indorse it on the note, or to deduct it from his damages; but not having done either he cannot conscientiously retain the money.”⁴⁰

In a prior case the principle was placed directly on the ground of a breach of trust. The court said: “When the defendant [an attorney] received the note to collect or put in suit, as an attorney of the court, he is not to be considered as a mere agent to receive the money, but also as having authority to discharge the plaintiff. When this money was paid to him, it was on the trust that he would discharge the plaintiff, either by indorsing it or by crediting it when he entered judgment, and it cannot be presumed that, notwithstanding this payment to the plaintiff’s attorney in that suit, the defendant was expected to retain counsel and call on the present defendant as a witness to prove this partial payment. When the defendant proceeded and took judgment without deducting the payment, he was guilty of a breach of the trust reposed in him by the plaintiff; and for this breach he ought to refund

⁴⁰ *Rowe v. Smith.* 16 Mass., 307.

the money to the plaintiff. Indeed, the plaintiff has no other remedy. He cannot reverse the judgment, and an action does not lie for an error in assessing the damages."⁴¹ And, accordingly, where there was no trust reposed, but the claim was contested, it was afterward held the defendant could not bring a subsequent suit for payments made prior to the first action.⁴² The court remarked that the defendant had lain by for some reason. If it were by mistake, the proper remedy was by a review; if otherwise, and for the mere purpose of bringing a subsequent action, neither justice nor the policy of the law would tolerate so vexatious a course of conduct.

Alabama seems to hold the contrary doctrine.⁴³ Formerly, also, New Hampshire, on the general ground that what could have been adduced as a defense cannot afterward be availed of.⁴⁴ But this was expressly overruled, subsequently, and the rule affirmed to be as held by the New York and Massachusetts courts.⁴⁵ In overruling, the court say: "The general principle thus annunciated by the court may be entirely correct, and it may be admitted to be in accordance with the authorities. Still, the question arises whether the plaintiff, in order to make out his case, must necessarily have re-examined the merits of the original judgment. If this were unnecessary, the principle on which the judgment was rendered, although sound in the abstract, was incorrectly applied to the circumstances of the case. If the plaintiff could not have recovered without inquiring into the merits of the case which had been settled by the judgment, then the decision was right and the plaintiff in the action cannot recover."

On the other hand, while I believe the doctrine is still held in Massachusetts and New Hampshire, the case above cited in New York has been expressly overruled, and the doctrine now stands in that State against it. In overruling, the court makes the sweeping charge that it cannot be maintained on any principle known to the law, and vigorously arrays against it

⁴¹ *Fowler v. Shearer*, 7 Mass., 23. ⁴⁴ *Tilton v. Gordon*, 1 N. H., 34.

⁴² *Loring v. Mansfield*, 17 Mass., 395. ⁴⁵ *Snow v. Prescott*, 12 N. H., 539.

⁴³ *Broughton v. McIntosh*, 1 Ala., 103; *Mitchell v. Sanford*, 11 Ala., 695.

both formidable citations and formidable arguments, declaring that, "The justice that conflicts with well settled principles of law, settled and declared by enlightened men from broad views of the public welfare, may safely be regarded as of very doubtful character. It is usually the offspring of negligence, and the parent of bad law. It is an old maxim translated into English that it is for the interest of the republic that there should be an end to litigation. In the last case cited the plaintiff there, as here, had full opportunity and was expressly notified by the first suit to appear and set up his defense, as the plaintiff there claimed to recover the full amount. He chose to think he was not in earnest, or if he were that the plaintiff here could sue and recover it back. He could have appeared and compelled the allowance of the payments at a trifling expense, compared to the cost of this litigation. In fact, the defendant there might have litigated the question at the expense of the plaintiff there by serving the offer to allow judgment for the proper amount as provided for by the Code; or when he found that the plaintiff there had taken judgment for too much, he might have had the judgment opened, and litigated the question upon just terms. The law cannot uphold the trust and faith that allow a man to lie by, as the plaintiff here did in the first suit, and rest upon the belief that the plaintiff there would not do what, in the summons or complaint, he had expressly notified this plaintiff he would do, viz: take judgment for the whole amount of the note, and then maintain an action to recover back part of the judgment on the ground that his just confidence had been betrayed; having, as he knew, a good defense, he thought of course that the plaintiff there, as an honest man, would recognize it. Such doctrine puts an end to the effect which the wisdom of ages has given to judgments. If he had been ignorant of the defense, and the plaintiff, well knowing its existence, had fraudulently concealed it from him, he could not sustain another action to 'rip up' everything adjudged in the first suit."⁴⁶

⁴⁶ *Binck v. Wood*, 43 Barb., 320.

This overruling decision seems to have been a restoration of the former New York doctrine. As, in 1812, a case arose of this kind: A gave B a note payable on demand, which was assigned to C, who sued on it, although A had previously paid it to B. It was held that, although C took the note subject to all equities between A and B, yet A ought to have set up the payment in the suit by C; and failing to do so, he could not bring another action against B to recover back the money.⁴⁷ And again, in another case, A was arrested on a charge of having taken B's bridle, and compromised the matter by giving his note to B on the promise of the latter that if A would ever show that he was innocent of the charge, or if the bridle should be found, the note should be given up and B would pay A for his trouble. Judgment was afterward recovered on the note, which A paid. Subsequently he brought an action to recover back what he had paid thereon on the ground that he was innocent of the charge, and that B had got his bridle again without A's knowledge or assistance. But it was held that, as this defense could have been put in against B's suit on the note, the suit could not be maintained by A.⁴⁸

Vermont has decided against the right to maintain the second action in such case, but by a divided court.⁴⁹

On the whole, I judge the general rule will prevail in most of the States that a defendant must see to it that his rights are properly protected in court, or else suffer the consequences of his own laches therein. Properly speaking, there can hardly be such a thing as a relation of trust or confidence between the parties in litigation, their interests being diverse, and their position necessarily antagonistic.

SEC. 268. The question of cross-claims, or set-offs, requires our notice. It has been held that where a defendant has a set-off, or counter claim, applicable to the subject-matter of a suit brought against him, he may produce it, but is not bound to do so. But if he does submit it to litigation, he is bound by the results. The parties are at liberty to settle their con-

⁴⁷ *Loomis v. Pulver*, 9 Johns., 244.

⁴⁹ *Corey v. Gale*, 13 Vt., 639.

* ⁴⁸ *Leonard v. Wilkins*, 9 Johns., 232.

troversies in such cases in one suit, or by separate actions; as, for example, a breach of warranty in Michigan can be set up by way of recoupment in an action for the purchase price of land, or otherwise be sued on separately, at the election of the defendant.⁵⁰ And so in New York, in regard to warranty of personal property. If a defendant sees proper he may allow judgment against him for the full value of the goods, and then bring an action for the breach of warranty, or he may recoup the damages resulting from the breach in the action against him for the price.⁵¹ The same has been held in Iowa.⁵²

Where a defendant offers evidence on an account filed in set-off, however, and the question of allowance or disallowance is passed on by the jury, who decide to disallow it, he cannot, in a subsequent suit, avail himself of the same account.⁵³

SEC. 269. Where there is a compromise agreement by which a judgment is rendered on the condition that certain mortgaged property is to be bid off in full satisfaction of the judgment, and thereon the debtor, relying on the agreement, forbears to put in certain available off-sets, it is held in Iowa that the creditor violating the agreement cannot set up the judgment afterward as a bar to a separate action on the set-offs;⁵⁴ but nothing which cannot be made available as a claim can be made available as a set-off.⁵⁵

SEC. 270. In Massachusetts it has been held that where a set-off is allowed by a plaintiff, who obtains judgment by default, but the value of the articles credited is held too low by him, the defendant may afterward sue for the value of the articles.⁵⁶ The case can certainly not be drawn into general precedent, I judge.

SEC. 271. An amount not due claimed as a set-off and disallowed on that account, may, of course, be sued for in a subsequent action after it matures.⁵⁷

SEC. 272. It has been held in Missouri that if a set-off was

⁵⁰ *Barker v. Cleveland*, 19 Mich., 237.

⁵⁴ *Savery v. Sypher*, 39 Iowa, 675.

⁵¹ *Barth v. Burt*, 43 Barb., 628.

⁵⁵ *Jones v. Richardson*, 5 Met., 252.

⁵² *Fairfield v. McNany*, 37 Iowa, 75.

⁵⁶ *Minor v. Walter*, 17 Mass., 237.

⁵³ *Baker v. Stinchfield*, 57 Me., 363.

⁵⁷ *Crabtree v. Welles*, 19 Ill., 57.

inadmissible in the first suit, yet, if it was really admitted, and passed on, it will bar a subsequent action on it. The court say: "The principal objection is that the set-off which the plea recites was inadmissible in the former suit, and is, therefore, no bar to the present action. We do not think it material, in this action, whether the set-off was a proper one or not. The reasons suggested by the counsel for the defendant in error against the admissibility of such set-offs are certainly forcible, and probably conclusive. But we consider it as well settled that where a defense has been insisted on in a former action, submitted to and passed upon by a jury, and not objected to by the plaintiff, the party making such defense cannot afterward maintain an action for the matter thus set off; the record of the former suit is a bar."⁵⁸ And it has been held, moreover, that if a party unintentionally includes an item of account in an action, the adjudication on it will be conclusive, at least in another court, in a second action,⁵⁹ although it appears, if withdrawn during the trial, it is otherwise.⁶⁰

SEC. 273. A party cannot divide an off-set so as to bring a portion of it within the jurisdiction of a justice of the peace, and then bring a subsequent suit to recover the balance.⁶¹

SEC. 274. Where one buys an article of personal property, as a horse, and gives his note for the purchase price, and the note is sued on, he is at liberty to recoup damages for fraud in the sale, or otherwise to allow judgment to go against him for the note and bring an independent action for the fraud.⁶² This is on the general rule that "a defendant having a right of set-off or cross action may at his election bring it forward in the suit against him, or bring an independent action upon it. * * * * * He is not bound to plead his set-off, though if he pleads it a decision against him is conclusive."⁶³

SEC. 275. Where a defendant elects to bring a separate

⁵⁸ *Thompson v. Wineland*, 11 Mo., 245. ⁶¹ *Rice v. Whitney*, 12 Ohio St., 358.

⁵⁹ *Street v. Beckman*, 43 Iowa, 496. ⁶² *McDonald v. Christie*, 42 Barb., 37.

⁶⁰ *Robinson v. Wiley*, 1 Hemp., 38. ⁶³ *Robbins v. Harrison*, 31 Ala., 163.

action on his claim, he cannot also, after verdict, avail himself of it in mitigation of damages in another action against him.⁶⁴

SEC. 276. Wherever a set-off or recoupment of unliquidated damages might be made, it is not obligatory, but the claim may be made the basis of a separate action. Thus, one who contracted to dig a cellar and lay a cellar wall within a certain time, and at a specified price, failed to complete the work by the time designated, whereby the owner suffered damage. He sued for the price of the work; judgment was obtained therefor, which judgment was collected. Afterward the owner sued for the breach of contract, and it was held he was not barred.⁶⁵ The court explained the matter, and distinguished the case from one where suit is brought, not for a stipulated price but on a *quantum meruit*, wherein damages *must* be set off. "It is evident that the plaintiff's causes of action are not barred on the ground that they were adjudicated in the defendant's suit, in the sense that they were therein tried. In that suit, the defendant sued for and recovered the full price stipulated in the contract to be paid for the work, deducting what had been previously paid. In no way were the plaintiff's alleged causes of action necessarily involved in the trial of the issue presented by the defendant in his suit. There is a class of cases in which a party seeks to recover for work done and materials furnished in regard to which no price has been agreed upon between the parties. In such cases the workman recovers upon *quantum meruit*, and of necessity must show what he reasonably deserves to receive, under all the circumstances, for his labor and materials. Any failure of the workman properly to perform the work, and any damage to the employer from known unskillfulness in its performance, are involved in the determination of the issue presented by the plaintiff. A failure by the employer, when sued, to show the damages sustained by him from any known unskillfulness, or improper performance of the work, would bar him from again litigating, in a suit in his own favor, in regard to

⁶⁴ *Stevens v. Miller*, 13 Gray, 284. ⁶⁵ *Davenport v. Hubbard*, 46 Vt., 205.

such damages. But where the price to be paid for the work, or for an article sold with warranty, was agreed upon, it was, for a time, a disputed question in the common law courts of England, whether the employer or purchaser could, in defense, or in reduction of the contract price, show that the work had been improperly or unskillfully performed, or that the article purchased did not answer the warranty. It was finally resolved that the employer or purchaser, if he had received no benefit, might show such matters in defense of an action by the workman or vendor, but if he had received some benefit, the workman or vendor must recover and the employer or purchaser resort to a separate action for negligence or false warranty. (*Baster v. Butler*, 7 East, 479, and notes.) It was not held by that court, so far as we are aware, that the employer or purchaser must, when sued by the workman or vendor, show such matters in defense, or be barred from all remedy. * * * * It would operate as a hardship upon the purchaser to be always bound to do so. It would limit the extent of his recovery for the breach of warranty or the contract to that part of the price which remained unpaid — often a very inadequate remedy — unless he plead it in set-off. A plea in set-off sets up an independent cause of action, and may be used, or not, as a defense, at the pleasure of the defendant. If he forbears to use it, his right to establish his claim by a separate action is not, as a general thing, impaired."

SEC. 277. I suppose the principle above stated as to *quantum meruit* actions applies to professional services, and explains the rule previously referred to, *supra*, that one failing to set up malpractice as a bar to the suit of a surgeon for fees, will not be allowed, after the plaintiff recovers in the action, to bring a separate suit for the malpractice, although, of course, if the plea is actually urged, and is unavailing, the matter rests on the usual ground of the bar of a prior actual adjudication,⁶⁶ as also the opposite, as where in an action for medical attendance of the plaintiff's intestate, a judgment

⁶⁶ *Howell v. Goodrich*, 69 Ill., 556.

recovered by the defendant against the intestate for negligence in his treatment of the defendant is conclusive against the maintainance of the suit.⁶⁷

SEC. 278. Where a defense is set up in an action at law, and is rejected by the court on the ground that it is not legal, but equitable, as, for example, in an issue on the validity of a patent, in an action to recover possession of real estate, the result is not conclusive on the defendant, so as to debar him from bringing an equitable suit to set aside the patent on the ground of its invalidity.⁶⁸ Or, where a set-off cannot be allowed because of the interposition of a trustee in a court of law, it may nevertheless be allowed in a court of equity.⁶⁹

SEC. 279. The rule of exclusion has been drawn very rigidly sometimes, as, for example, where the first suit is for a breach of contract, and the second for the price of articles to be delivered, as stipulated by the contract, it has been held in New York the action is not maintainable. Thus a vendee brought an action against a vendor for non-delivery of wheat, and recovered judgment for the full value of the wheat, although but a nominal price had been actually paid thereon, and afterward the vendor sued the vendee for the price of the wheat as stipulated in the contract, and he was held precluded, because he ought, in the former action, to have insisted that the measure of damages therein was only the difference between the contract price and the value of the article, and having omitted to do so, he could not bring a cross action. The court assigns, as the basis of the decision, "that the damages in each covenant or agreement may be very different, as where they are in the same instrument, and the one not the consideration of the other, or where the covenants or agreements go only to part of the consideration on both sides, part having been executed, and the like cases; in all such the damages might be different, and a remedy must be sought in a suit by each party for a breach. So the terms of the instrument may be such that the covenants or agreements must

⁶⁷ *Edwards v. Stewart*, 15 Barb., 67.

⁶⁸ *Hobbs v. Duff*, 23 Cal., 627.

⁶⁹ *Arnold v. Grimes*, 2 Iowa, 1.

necessarily be independent, without the existence of the reason above assigned; in such case the court will carry into effect the agreement according to the intent of the parties, but whether the covenants or promises are independent, or not, where the agreement is wholly executory, and the one covenant or promise or performance is the consideration of the covenant or promise or performance of the other, it may be stated with confidence that there is no principle or authority which will maintain a suit at law by a party who has positively refused to fulfill his part of the agreement, against the other, to recover damages for the breach of it.”⁷⁰

SEC. 280. The rule that whatever can be tried *must* be tried does not seem to prevail in Connecticut. The doctrine there, as stated by the court, is: “In our modern practice, it is usual to insert several general counts in a declaration, and when the general issue is pleaded to these, many different claims may be tried. Where, upon pleadings thus framed, a general judgment is rendered, and is thereafter pleaded in bar, it is *prima facie* evidence of a prior adjudication of every demand which might have been drawn into controversy under it, but like other *prima facie* evidence, it may be met and controlled by other competent evidence tending to show that any particular demand or claim was not presented or considered. To render a former judgment conclusive on any matter, it is necessary that it should appear that the precise point was in issue and decided, and this should appear from the record itself.”⁷¹

SEC. 281. In New York it has been held that sometimes a plaintiff may decline to submit a matter for adjudication, as where he has applied for a discontinuance and his application has been refused, and although the court proceeds to consider merely the counter claim of the defendant, he can bring a subsequent action on his claim.⁷² This is doubtless the same as taking a voluntary nonsuit.

⁷⁰ *Dey v. Dox*, 9 Wend., 132.

⁷² *Jones v. Underwood*, 35 Barb., 211.

⁷¹ *Hungerford's Appeal*, 41 Conn., 327.

CHAPTER XXI.

IDENTITY OF ISSUES IN THE FIRST AND SUBSEQUENT ACTIONS.

Section 282. Same Issue Defined.

- 283. Cause of Action not necessarily the Same.
- 284. Or even Similar.
- 285. Application of the Rule to similar Bonds, etc.
- 286. Trespass—Installments.
- 287. Title in Trespass Suit.
- 288. Assumpsit and Specific Performance.
- 289. Contract and Tort not under the Rule.
- 290. Evidential Facts not Conclusive.
- 291. Connecticut Rule.
- 292. Order of Suits—First Judgment Bars.
- 293. Illinois Rule—Cause must be Same.
- 294. Non-Essentials do not Bar.
- 295. Issues must pass into the Judgment as well as the Verdict.
- 296. Applied to New Trials on Special Issues.
- 297. How Identity Determined.
- 298. Record and Parol Proof.
- 299. Record not to be Contradicted.
- 300. When Parol Evidence Available.
- 301. Connecticut Rule.
- 302. New York Rule.
- 303. When Record only Prima Facie Proof Parol Evidence Allowed.

SECTION 282. It is universally conceded that the same issue must be presented in both suits in order that there should be a bar, or that the evidence of a former adjudication should be

conclusive. The identity, however, should be alike in the proposition, and not rest merely in a course of argumentative deductions. And where two adjudications—the parties being somewhat different therein—were brought together in a third suit by the parties, respectively, the court said: “The situation of the parties, then, is this: The plaintiff has an adjudication in his favor in a suit against the defendant, in which the precise question now in controversy in respect to his saw-mill wheel was litigated. The defendant has, at most, an adjudication in which the plaintiff and another were plaintiffs, not upon the precise point now in controversy, but upon the fact as to the flooding the grist-mill wheel, which, by argument founded on the admission of facts not adjudicated, he insists demonstrates that the two questions ought to have been decided in the same way. This does not present a case of adjudication against adjudication, but only of an adjudication one way, and a probable argument founded on another adjudication of a distinct question the other way. It leaves the effect of the first judgment untouched.¹ So a decree of partition is only conclusive of lands embraced in it, and does not prevent the heirs from showing, in another action of partition, that they are joint owners of other lands.² So, where an assignment was assailed for fraud, as void in regard to particular property involved in suit, it was held not to extend to other property in the same assignment but not in suit.³

It is quite a different point whether one is jointly liable with others, or is individually liable.⁴

On the other hand, whether a person is entitled to an open railroad crossing is necessarily included in the question whether he is entitled to damages for not having it.⁵

A finding that something is due on a mortgage is not the same as an inquiry and finding as to *how much* is due.⁶

But it would be an endless, hopeless, and correspondingly useless, task to point out specific identities between issues. A

¹*Mersereau v. Pearsall*, 19 N.Y., 111. ⁴*Doe v. Hildreth*, 2 Carter, 274.

²*Ihmsen v. Ormsby*, 32 Pa. St., 198. ⁵*Bettys v. R. R.*, 43 Iowa, 604.

³*Roberts v. Robeson*, 27 Ind., 455. ⁶*Campbell v. Consalus*, 40 Barb., 511.

comparison is needful in each case. And it will be much more to our present purpose to consider the question whether the cause of action or the object thereof must also be the same, or whether the same issue coming up *incidentally* in the second suit is barred by a *direct* adjudication in the first.

SEC. 283. Upon this matter the Supreme Court of New York said in 1851: "The position that in order to raise an estoppel by a prior judgment, the cause of action in the second suit must, in all respects, be the same as in the first, we feel no difficulty or doubt in rejecting. It is not, indeed, absolutely novel, but it is repugnant to the reasons of public policy embodied in the maxim *Interest reipublical ut sit finis litium*, upon which the doctrine of the conclusiveness of a judgment is founded, and so far from being sustained by authority, it is contradicted by many decisions. The decisions clearly show that the identity which the law requires is widely different from that upon which the learned counsel for the plaintiffs insisted."⁷ The meaning of the same cause of action has been defined to be where the same evidence will support both the actions, although they may be grounded on different writs;⁸ and the like with issues. And so, where one in an action of trespass *quare clausum fregit*, and for cutting and carrying away wheat, pleaded a former suit against him for the wheat, it was held a bar because the proof was the same in both cases.⁹ And it has been held that a difference in the *measure* of damages will destroy the bar; so that a civil action will not, it is said, bar a penal action between the same parties, because the measure of damages in the one is not the same as in the other. But the doctrine does not seem to me to stand on good grounds. However, the Vermont court thus explains it: "The objection to this ruling is not that the very point was not there litigated between the same parties, but that that action being a civil suit the jury might have found the fact upon the mere preponderance of evidence, and that they might not have so found if they had been required to be

⁷ *Birckhead v. Brown*, 5 Sandf., 141. ⁹ *Johnson v. Smith*, 8 Johns., 383.

⁸ *Bull v. Hopkins*, 7 Johns., 21.

satisfied of it beyond a reasonable doubt, and, therefore, that their verdict, resting upon such inferior amount of evidence, ought not to be held conclusive, or admissible, in this penal action. We think the objection stands on solid grounds. All who are conversant with courts must have observed that juries will render verdicts in civil cases upon light evidence, the mere balance of probabilities, when, in criminal cases, nothing would induce them so to decide. The law justifies them in so doing. The distinction is an important one, and leads to widely different results. To admit the judgment in trover as conclusive here, might operate to deprive the defendant of the right to have the rule of full proof in criminal cases applied to his case. But we do not think it admissible, even as *prima facie* evidence of the legality of the notice.”¹⁰

SEC. 284. In Vermont, it has been held that the causes of action need not be even similar, so that where one brought an action of slander for words charging the theft of certain cloth, and the defendant justified by setting up the truth of the words, and the plaintiff gave in evidence a former judgment in his favor rendered in an action of trover, brought against him by the defendant for the alleged taking of certain cloth, which was admitted to be the same cloth and all the cloth concerning which the words had been spoken, this was held to be conclusive on the defendant in the pending action, both as to the title to the cloth, and as to the defense he had set up in justification.¹¹

SEC. 285. It is on the principle that the cause of action needs not to be the same, although the issue must be the same, that the rule rests, which we have already had occasion to notice; namely, that a suit on one promissory note or bond will be conclusive upon another executed under the same circumstances, if also sued on. The New York Supreme Court thus explains this, per BRONSON, Ch. J.: “As I understand the facts, the plaintiff sued then, as he does now, for contribution [governed, however, by the same principles in this regard which govern a direct action on the bonds]. The declarations in the

¹⁰ *Riker v. Hooper*, 35 Vt., 461.

¹¹ *Perkins v. Walker*, 19 Vt., 145.

two cases are precisely alike, except that they mention different bonds as a part of the groundwork of the action. But both bonds were given at the same time, upon the same consideration, and as parts of one and the same transaction. In answer to the first action, the defendant pleaded the same release and consent that are set up in answer to this action and, upon demurrer, judgment was rendered in his favor. We have, then, the judgment of a court of concurrent jurisdiction, directly upon the point made by this suit; and nothing is better settled than that such a judgment, so long as it remains in force, is conclusive between the same parties in another action upon the same matter. It is true that there is a shade of difference between the two cases, as to the necessary proof on the part of the plaintiff to sustain the action. Different bonds are mentioned in the two declarations. But, so far as relates to the principal question in controversy, to-wit, the right of the plaintiff to demand and the duty of the defendant as a co-surety to make contribution, the two cases are precisely alike. The defense is precisely the same in both actions. The matter which the plaintiff now attempts to agitate anew is *res judicata*. The case of *Gardner v. Buckbee*, 3 Cowen, 120, is in point. The defendant had given the plaintiff two promissory notes for the consideration money on the purchase of a schooner. In a suit on one of the notes the defendant set up a total want of consideration, on the ground of the fraud of the plaintiff in making the sale, and judgment was rendered for the defendant. In a suit subsequently brought by the plaintiff upon the other note, the former judgment was held a conclusive bar. So here, the two bonds were given at the same time, and upon the same consideration, and the parties were alike co-sureties in both. The defense set up in answer to the plaintiff's claim for contribution was the same in the former action that it is now; and the judgment rendered in that action is a conclusive bar to any new litigation of the same matter.”¹²

¹² *Bouchaud v. Dias*, 3 Denio, 243.

SEC. 286. "The case of *Bent v. Stembergh*, 4 Cowen, 559, is a further illustration of the same principle. This was an action of trespass for entering on the plaintiff's land and cutting timber. The defendant claimed the land as his own, and had cleared and fenced it. The plaintiff claimed the land as part of the Schoharie patent. The defendant claimed as part of Weyfield and Clifford's patent. The plaintiff gave in evidence a record of judgment in the Supreme Court in which he was plaintiff, and Stembergh defendant, showing a verdict and recovery for a former and different trespass. He further proved by parol that the former trespass for which he had recovered was at the same spot of ground, and that the question on the former trial was whether the land lay within the Schoharie patent or within Weyfield and Clifford's. It was adjudged that the former determination of that question was conclusive between the parties, the plaintiff's right of recovery and the defendant's defense in the second action depending on the same question of title tried and determined in the first. In each of these causes the cause of action in the second suit was different from the cause of action in the first, but the former determinations were held to be conclusive because the same question was determined in the first suit on which the second depended."¹³

The same was ruled in Indiana in the case of two promissory notes given for installments of the purchase money of real estate.¹⁴

SEC. 287. Where a plaintiff brings an action of trespass *quare clausum fregit*, and the defendant, under the general issue, litigates the question of title, and the verdict on that issue is rendered against him, and afterward the plaintiff brings a direct action to try the title, the former judgment will be conclusive, and the defendant will not be allowed to dispute the title.¹⁵ And so, where a plaintiff is allowed, in an action for recovering the possession of real estate, to bring in

¹³ *Doty v. Brown*, 4 Comst., 75; *Bent v. Stembergh*, 4 Cowen, 559.

¹⁴ *French v. Howard*, 14 Ind., 455.

¹⁵ *Shettlesworth v. Hughey*, 9 Rich., 387.

a claim, at his election, for rents and profits, and he accordingly sets up such claim in such an action, he cannot afterward bring a separate suit for rent.¹⁶ And, in Missouri, a judgment for damages in a possessory action, although it be merely nominal, will debar a subsequent suit for rents received prior to the judgment.¹⁷

SEC. 288. Where an action at law is instituted on a promissory note given for the purchase money of land, the judgment therein is conclusive as to the amount due on the note; and if the defendant afterward bring a bill in equity for specific performance of the contract of purchase, he cannot therein claim the benefit of payments which ought to have been credited on the note.¹⁸

SEC. 289. A suit on a contract, however, in which a promise is alleged and a breach of the promise, is held not to debar a subsequent action in tort based on fraudulent representations in making the contract—these issues being essentially different. In a case of this kind the Massachusetts court say: “It is very plain, upon a comparison of the allegations and cause of action set forth in the former suit, the record of which the defendant produced and offered to give in evidence, with the allegations and cause of action set forth in this, that the points or questions in issue are not the same in the two suits, and consequently that the judgment in the former constitutes no bar to the maintenance of the present action. It is true that both originated in the same series of transactions, and in the conversations and communications which took place between the parties concerning them. But the result of the former suit shows that the plaintiff there wholly mistook the effect of what was said by the defendant, and so failed to establish the claim which he then attempted to enforce. That was an action of contract in which a promise and a breach of the promise were averred. This is an action of tort in which the plaintiff alleges that he sustained damage by the willfully

¹⁶ *Walker v. Mitchell*, 18 B. Mon., 541.

¹⁷ *Stewart v. Dent*, 24 Mo., 111.

¹⁸ *Bolle's Heirs v. Stickney*, 36 Ala., 483.

fraudulent representations of the defendant. Proof which would fully support the one would have no tendency to maintain the other, for the reason that the questions involved in the respective issues were essentially unlike. It follows, as a necessary consequence, that the judgment in one of them is not competent evidence upon the trial of the other, and cannot have the effect of precluding the plaintiff from maintaining it.”¹⁹

SEC. 290. Mere evidential facts, however, are not usually held conclusive. The matters must be within the *substance* of the issue, and necessary to the determination of the controversy. All others are merely collateral. The California court appears to restrict them to the actual pleadings in the first case,²⁰ but in this is not supported by the weight of authority, except so far as they all agree that the adjudicated points must be within the *scope* of the pleadings, that is to say, must be relevant to the case.

SEC. 291. The Connecticut court thus announces the rule prevailing in that State, which, if I correctly understand, does not materially differ in substance from what is generally held: “Although the object and purpose of two actions being different, the judgment in one cannot be used by way of *bar* to the other, it does not follow that in the second action either party can be permitted to contradict what was expressly adjudicated in the first.”²¹

SEC. 292. As to the order of the suits, it may be needful to bear in mind that it is not, of necessity, the suit first begun which rules the other by its result. It is the *first judgment rendered* which controls, whether the action in which it is rendered be instituted before the other or not. And the rule applies where the first judgment rendered is in another state.²²

The Pennsylvania court, in an early case, gives the reason

¹⁹ *Norton v. Huxley*, 13 Gray, 290.

²⁰ *Garwood v. Garwood*, 29 Cal., 521.

²¹ *Betts v. Starr*, 5 Conn., 553.

²² *Child v. Powder Works*, 45 N. H., 547.

for the rule thus: "Because, although the priority of an action may be a very good reason why a subsequent one for the same cause shall not abate it, and why the first when pleaded properly should abate the second, as the plaintiff ought not to be permitted to vex and harass the defendant, against his will, with two actions for the same cause, yet it is obvious that it is not the priority in the commencement of the one action that renders the judgment obtained therein a bar to the plaintiff's obtaining a second judgment in the other, but because the first judgment, when given, whether it be in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof, one of a higher order."²³ This, indeed, does not say that if the two actions are for different causes, an essential question will be barred in the pending action by the action already adjudicated, but I see no reason why the rule will not extend to this case also.

SEC. 293. In Illinois the doctrine is that the *cause of action* must be the same in both suits, and that, too, where the two actions are on the same instrument of writing.²⁴ And it is the same in Louisiana, where the court defines the rule to be: "In order to justify courts of justice to reject a demand as contrary to the authority of a thing adjudged a legal verity, it is necessary that the thing demanded should be founded on the same cause of action, and that the contest should be between the same parties acting in the same qualities. Thus, identity of the things demanded, identity of the causes of action, and identity of the parties and of their qualities, are the conditions upon which the legal presumption is established in favor of the thing adjudged."²⁵ But I think this rule is anomalous, and contrary to the weight of authority, and to the rule laid down in the *Duchess of Kingston's* case, generally adopted, both in this country and in England. And in another leading case, Lord KENYON stated the rule

²³ *Duffy v. Lytle*, 5 Watts, 130; *Casebeon v. Mowry*, 55 Pa. St., 422.

²⁴ *Smalley v. Edey*, 19 Ill., 211.

²⁵ *Slocomb v. Lizardi*, 21 La. An., 356.

to be, that the party disputing the former judgment should show, beyond all controversy, that the second was a different cause of action from the first, and that "they were not in the least blended together"²⁶ — which is equivalent to requiring merely an identity of issue, and not of the cause of action—direct in the first, but either direct or collateral, yet essential in the second. And the Connecticut court, citing the case, expresses the doctrine, indirectly at least, that judgments are "conclusive of facts within their purview," and that "a different doctrine would open all judgments to a new inquiry, and take from them their character for verity; and they would frequently be the occasion of renewed controversy."²⁷

SEC. 294. We have already had occasion, however, to remark that the issue in the first cause must be essential, and therefore within the scope of the essential issue of the controversy therein, as an adjudication is conclusive only for the purpose for which it is made; as, for instance, many things may be introduced into an administration account which do not necessarily become *res adjudicata* in consequence of the judgment of the court thereon.²⁸ So if there be a misjoinder of issues, or causes of action, the irrelevant issue will doubtless be disregarded simply; for, such misjoinder is not even ground for reversing a cause by the appellate court.²⁹

SEC. 295. Actually adjudicated issues must, in general, be involved in the final judgment in order to be conclusive. And so it has been held that an allegation of a complaint which does not enter into the judgment is not subsequently available as a bar or in evidence.³⁰ But an issue in bar, although it embraces also an issue in abatement, will effectually conclude the parties in all future controversies³¹ if it passes into judgment, the presumption being that the result rests on the plea in bar, since a party by pleading in bar necessarily overrules his own plea in abatement. The verdict, however, which is

²⁶ *Seddon v. Tutop*, 6 T. R., 609.

²⁷ *Bottorff v. Wise*, 53 Ind., 32.

²⁸ *Pinney v. Barnes*, 17 Conn., 429.

²⁹ *Sweet v. Tuttle*, 14 N. Y., 469, 473.

²⁸ *Fish v. Lightner*, 44 Mo., 270.

³¹ *Sheldon v. Edwards*, 35 N.Y., 289.

the basis of the judgment, must not be merely inferential, but direct; not argumentative, but affirmative or negative. The issue "must be an averment of a fact precisely stated on one side, and traversed on the other; and found by the jury, affirmatively or negatively, in direct terms, and not by way of inference. It is not, indeed, necessary that the action in which it is found and that in which it is relied on should be of the same kind, or for the same cause of action. If a question upon the execution or validity of a deed be put in issue in an action of trespass, and expressly found by the jury, such verdict and the judgment upon it may be relied on as conclusive evidence of such fact on the trial of a real action or writ of right, between the same parties, for the same estate. It has become a fixed fact between the parties for all purposes."³² *

SEC. 296. Even if matters do pass into the verdict, they do not bind unless they also pass into the judgment necessarily. Thus, in an action on a promissory note there were certain special findings in favor of the defendant, relating to the consideration of the note, but the court directed a general verdict for the plaintiff on grounds to which the defendant alleged exceptions, which were afterward sustained; and, a new trial was ordered. On the new trial the plaintiff confessed that the special findings negatived the only consideration of the note on which he relied, whereon the judge directed a verdict for the defendant, refusing to allow the plaintiff to offer evidence on the matter of the consideration, because he was concluded by the former verdict. But the ruling was decided to be erroneous because the verdict as to the special points had not passed into the judgment.³³ I do not well understand the ground of this decision, because when an entire new trial is ordered the parties certainly begin *de novo*, and are not bound by any findings in any form in the other trial. The matters on one trial of a cause are not, as I think, ever *res adjudicata* as to a subsequent trial of the same cause. The proceedings

³² *Sawyer v. Woodbury*, 7 Gray, 502. ³³ *Hawks v. Truesdale*, 99 Mass., 558.

* I judge this is a correct application of the rule concerning issues. But see *contra*, Sec. 200, *supra*, p. 169.

are as if the cause had never been tried at all. However, in this case, the general reasoning looks different. The court say: "The question, therefore, which the case presents is this: In a suit at law can special findings of a jury not confirmed by any judgment of the court, nor involved in any general verdict, be relied on in a trial before another jury in the same or another suit, as proof of the facts thus found? We think it clear, both upon principle and authority, that they cannot. It is the verdict with the judgment of the court upon it which constitutes the *res adjudicata*. That may furnish conclusive proof of all essential facts involved in it. Special findings may be resorted to, to ascertain upon what facts the verdict and judgment were rendered. But facts so found are not conclusively established between the parties unless they are also essential to, or shown to be involved in, the verdict and judgment. When facts specially found by the jury are necessarily decisive of the case, a general verdict in accordance therewith will be sustained, notwithstanding that exceptions are well taken upon other points, or that other controverted facts are not found in favor of the same party. Even where the verdict is to be set aside, the court may undoubtedly regard such special findings in determining whether the circumstances require that the whole case be opened for a new trial, or only that part of the case in respect of which there has been error at the previous trial. The cases cited by the defendant go no further than this. No decision is cited, and we think none can be found, to sustain the position of the defendant in the present case. The exceptions were sustained by this court without any limit upon, or direction in regard to the new trial, which would necessarily follow. The error at the first trial was not limited to any subordinate point, but affected the entire verdict. That verdict having been vacated, the special findings upon subordinate questions furnish no basis upon which another jury can render an opposite verdict, or any verdict whatever. They have not the force of adjudications by which either party can be concluded. If, upon the new trial, the plaintiff attempts to maintain positions and

establish proofs contrary to the positions and proofs which he sought to establish and maintain at the former trial, that may be urged against him and considered by the jury as matters *in pais*. But it will be for the jury and not for the court to determine how much weight shall be given to such circumstances. As the court below ruled that the plaintiff was precluded from proving any facts inconsistent with the special findings at the former trial, the verdict for the defendant was improperly directed." Now the puzzling features in this decision, to me, are, 1. The court *seems* to confine the rule of unavailability to "special findings in subordinate questions," whereas all questions, subordinate or otherwise, on a former trial, are alike nugatory on a new trial; 2. The court *seems* also to confine the plaintiff to the *positions* and *proofs* formerly assumed, and such as are consistent therewith, and to allow that such positions and proofs are competent evidence on the second trial for the consideration of the jury. I know not how this can be, except for impeaching purposes, to show that some witness testifies differently on the two occasions; and this extends no farther than that particular testimony, and does not reach either the *positions* or the *general proofs* before adduced.

In general, special findings are not conclusive of facts which although consistent with the general verdict are not essential to it, the general judgment being based of course upon the general verdict.³⁴

SEC. 297. We come now to the inquiry, in what manner is the identity of the issues in the two actions to be determined? The rule deducible from the authorities is that this may be proved by such parol evidence as does not contradict the record, but in all cases the record, so far as it presents the matter at all, must control as to what was the issue in the first case.

SEC. 298. In a case in Maine one of the facts disputed was whether there had been an assignment of a lease of real estate

³⁴ *Burlen v. Shannon*, 99 Mass., 200.

to the defendant. In a former case the same question had been determined favorably for the plaintiffs. When the former litigation was shown to have involved the point, by means of evidence *aliunde* the record, the defendant maintained that inasmuch as the record of the former judgment did not show that the point had been litigated, he had a right to contest the fact. But the court held the law to be otherwise, and said: "The fact having once been tried and determined, principles of sound public policy, as well as justice to the plaintiff, preclude the defendant from again contesting it. * * *

Litigation is an expense to the public, as well as to the parties. In fact, the expense to the public is often greater than it is to the parties. It is for the public good, therefore, that there be an end of litigation. And when a cause has been once fairly tried it ought not to be tried over again, even if the parties are willing.* Such a course would be unjust to other parties whose causes might be thereby delayed. As well might a man who has a right to draw water at a public fountain, when he has filled his pitcher, claim the right to upset it, and to keep others waiting till he had filled it over and over again." With so much on the reason and policy of the rule, the court say further as to the mode of proving the issues: "The fact that a question has been once litigated can sometimes, but not always, be proved by the record. If the fact that a question has been once before litigated can be shown by the record of a court of competent jurisdiction, the former judgment may be pleaded by way of estoppel, or given in evidence under the general issue. Whichever course is adopted, the result will be the same; the parties will be precluded from again litigating the same question. If the fact that the same question has been once before litigated cannot be shown by the record, the law is now well settled that it may be proved by evidence *aliunde*, and when thus proved the result is still the same. In such case, the party sought to be affected by the previous litigation may contest the fact that

*But how avoid that? Will the court itself ever intervene *sua sponte*?

the same question was then tried, but this fact being established the result will be all the same, whatever the *manner* of establishing it may be. It is the *fact* that the same point has been once tried, and not the manner of proving it, that precludes the parties from again contesting it. The mode of proving it cannot affect the quality or legal effect of a fact."³⁵ Thus if it be proved by parol that cruelty was the ground on which a decree of divorce was rendered, the cruelty will be as firmly *res adjudicata* as if the record shows it,³⁶ and whether the evidence which sustained the issue was strong or weak on the former adjudication is wholly immaterial,³⁷ and indeed out of the question altogether. And so it is competent for a party to prove by parol what questions were really considered and determined in the prior action,³⁸ whenever the form of the issue in the trial relied on is so vague that this cannot be ascertained by inspection of the record.³⁹

SEC. 299. But when the record *does show* either that an issue was or was not tried, parol evidence on that matter is not allowed to contradict it; but what needs not to appear, or what in fact does not appear, may be proved by parol, in order to establish the identity of the subject-matter, or of the grounds on which the former judgment was rendered, and (in Maine) to the extent of showing whether matters which might have been adjudicated under the pleadings were really passed upon.⁴⁰

SEC. 300. When, in the first suit, the declaration sets out a special matter as a ground of action, it has been held that parol proof is inadmissible to show that a different subject was litigated on the trial, because that would contradict the record which shows the issue.⁴¹ But if the pleadings are too general to show the issue, the rule is different; and, in actions before a justice of the peace, especially where there are no formal pleadings. Thus, where A took a bill of sale from B,

³⁵ *Walker v. Chase*, *passim*, 53 Me., 260. ³⁹ *Miles v. Caldwell*, 2 Wall., 43.

³⁶ *Burlen v. Shannon*, 14 Gray, 439. ⁴⁰ *Sturtevant v. Randall*, 53 Me., 154.

³⁷ *Id.*, 437.

⁴¹ *Campbell v. Butts*, 3 Comst., 174.

³⁸ *Battorff v. Wise*, 53 Ind., 35, and cases.

and C afterward levied on the property included therein by attachments in favor of A's creditors, and subsequently A took a part of the property and converted it to his own use, and C sued him therefor, and recovered judgment in a justice's court on the ground that the bill of sale was fraudulent as to A's creditors, and later A brought an action of replevin in the Supreme Court to recover the residue of the property, the justice's judgment was held to conclude the question of fraud, and parol evidence was held admissible to show what questions were controverted in the first action, and the grounds upon which the judgment had been rendered.⁴²

SEC. 301. Connecticut, formerly at least, held the doctrine of the entire inadmissibility of parol evidence to show what issues were litigated previously.⁴³ This, however, must always rest on the strictness of pleadings in defining the issues. If the issue is formed by special pleading, the latitude of parol evidence must, of necessity, be much more restricted than where the issues are general.⁴⁴ Says the United States Supreme Court: "It presupposes that all the constituents of the judgment shall be preserved by the court which renders it, in an authentic and unmistakable form. In the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entirely by a tribunal composed of one or more judges, this has been done without much difficulty. The separate functions of a judge and jury, in common law courts, created a necessity for separating issues of law from issues of fact; and, with the increase of commerce and civilization, transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing. The ancient system of pleading, which was conducive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the

⁴² *Doty v. Brown*, 4 Comst., 71..

⁴³ *Kennedy v. Scovill*, 4 Conn., 68, and cases cited from the same court.

⁴⁴ *Wood v. Jackson*, 8 Wend., 45

evidence of the adjudication, has been condemned as requiring unnecessary precision, and subjecting parties to over-technical rules, prolixity and expense. A system of general pleading has been extensively adopted in this country, which rendered the application of the principle contended for impracticable, unless we were prepared to restrict within narrow bounds the authority of the *res adjudicata*. It was, consequently, decided that it was not necessary, as between parties and privies, that the record should show that the question upon which the right of the plaintiff to recover, or the validity of the defense depended was decided, for it to operate conclusively; but only that the same matters in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury."⁴⁵

SEC. 302. The rule is stated by the New York court thus: "A former judgment may be given in evidence, with such parol evidence as is necessary to show the grounds upon which it proceeded; and where such grounds from the form of the issue do not appear from the record itself, it is competent to prove the same, provided that the grounds alleged be such as might legitimately have been given in evidence under the issue, and such as, that when it is proved they were given in evidence, it appears by the verdict and judgment that they must have been directly and necessarily in question as the grounds of the verdict."⁴⁶ Often where the record is general and does not show the points in controversy, the beneficial results of litigation must be effectually cut off by excluding parol evidence as to what it really was.⁴⁷

SEC. 303. And thus, if the record apparently covers the point at issue in the second case, but does not really do so, it has been held that this fact may be shown, because a recovery in a former action apparently for the same cause, is only *prima facie* evidence that the subsequent demand has been

⁴⁵ *Steam Packet Co. v. Sickles*, 24 How., 345.

⁴⁶ *Wood v. Jackson*, *supra*.

⁴⁷ *Eastman v. Cooper*, 15 Pick., 286.

tried.⁴⁸ And so, in such a case, while the record, in its vague and indefinite form, might be *prima facie* proof, yet the plaintiff could meet it by showing for what the former recovery really was, and that his claim now set up had not been submitted before, and was a distinct transaction not so identified with the former as to make it an entire and indivisible contract.⁴⁹ And so it has been held that where, by a rule of reference entered in a justice's court, parties submit "all their demands" to the referees, who make report to the court of common pleas on all the demands submitted, which court enters judgment thereon, it is still competent for one of the parties, in a second suit, to show that the particular demand was not in dispute, and was not laid before the referees, and therefore not included in the judgment.⁵⁰ And this must necessarily be the rule in all cases where specifications are not strictly required and general statements or general pleadings are allowed in presenting a case.⁵¹ And the necessity may go so far as to allow such parol evidence in regard to the very foundation subject of a suit.⁵²

⁴⁸ *Jackson v. Schoonmaker*, 2 Johns., 229.

⁴⁹ *Phillips v. Berick*, 16 Johns., 140.

⁵⁰ *Webster v. Lee*, 5 Mass., 339.

⁵¹ *Whittemore v. Whittemore*, 2 N. H., 30.

⁵² *Parker v. Thompson*, 3 Pick., 434; *Squires v. Whipple*, 2 Vt., 114.

CHAPTER XXII.

DIFFERENT FORMS OF ACTION.

Section 304. Statement as to Causes of Action.

- 305. Election between Contract and Tort bars.
- 306. Assumpsit not bar Trover as Bailee.
- 307. Damages for Deceit and Fraud.
- 308. Different Forms of Ex Contractu Actions.
- 309. Warranty or Non-performance.
- 310. Quarterly Rents Entire.
- 311. Assumpsit and Special Contract.
- 312. Conditional Judgment in Foreclosure.
- 313. Value of Property and Value of Use.
- 314. Judgment in Partition bars Writ of Entry.
- 315. Tort and Title Questions.
- 316. Ejectment and Boundary.
- 317. Mesne Profits and Trespass, etc.
- 318. Action on Official Bond bars Trover.
- 319. Replevin bars Suit for Trespass.
- 320. Trover bars Trespass.
- 321. Malfeasance not allow Impeachment of Judgment.
- 322. Detinue will bar Trover.
- 323. Formal Actions and Summary Proceedings.
- 324. Trespass and Right of Property.
- 325. Appeal bars Writ of Error.

SECTION 304. The subject of this chapter is strictly correlative to that of the last, and may almost be considered as a continuation of it, or, at least, a resultant from it. We have already had occasion to inquire whether the *causes of action* must be the same in the first and second actions, in order to admit a bar. And by the overwhelming weight of authority

the question resulted in the rule that while the issue must be precisely the same, yet the object subject and causes of action do not require to be identical; so that if the precise issue of the former suit, necessary to the determination of the controversy therein, be again brought between the parties in the latter action, even though collaterally, yet relevantly and materially, the former decision must conclude the matter from further dispute.

SEC. 305. Where a plaintiff may have an election to sue in contract or in tort, a judgment in one form will be an effectual bar to an action in the other form. For example, a judgment against an attorney in a suit brought for the breach of an agreement to enter satisfaction of a judgment and discharge the execution thereon, will be conclusive against a subsequent action of tort to recover further damages from him for directing an arrest under the execution specified in the agreement.¹

So, a judgment in trespass *de bonis asportatis*, is a good bar to *assumpsit* for the same goods. If, in the former case, it appears the plaintiff has no right of property in the goods, he will be held not to have the right to the value of them in the action of *assumpsit*.² And so a judgment in an action of tort for false representations of the soundness of personal property, in sale or exchange, resulting for the defendant, will bar a subsequent action of contract on the defendant's warranty, made at the time of the transfer, of the soundness of the property.³ So, where an action was brought on a promissory note given for goods sold, the defendant set up as a defense a want of consideration because of false representations of the plaintiff as to the value of the goods, and this was held to conclude him from bringing an action for the false representations⁴ on the principle that a matter once litigated will conclude the parties from litigating it anew in any form of action whatever.⁵

¹ *Smith v. Way*, 9 Allen, 472.

² *Bull v. Hopkins*, 7 Johns., 21.

³ *Norton v. Doherty*, 3 Gray, 372.

⁴ *Burnett v. Smith*, 4 Gray, 52.

⁵ *Hudson v. Smith*, 39 N. Y. Superior Ct., 459.

So, if an action of trover be brought, the result, on a full adjudication, will be to bar *assumpsit* for the same cause.⁶ However, in Pennsylvania it has been held that the former adjudication must be full; and thus where an action for breach of contract to float logs to a certain boom was brought, and the defense set up a former recovery in trover for their value, the court allowed the plaintiff to prove by parol that the recovery was only for a small portion of it declared for in the former action, because only a part of them had been actually converted. This is the doctrine of the court, doubtless, but in the case it is only *dictum*, since the judgment was unavailable because of a difference of parties, except as an incidental fact to show that the plaintiff in error had been paid *pro tanto* for his lumber.⁷

SEC. 306. Yet a judgment against a bailee, in an action of *assumpsit*, for a breach of his contract to transport and deliver the property entrusted to his care, in which the owner has recovered damages for the value of his property, without satisfaction, does not bar an action of trover against a third person who purchased the property from the bailee. "Satisfaction of the judgment would show that the plaintiff had no further claim for damages; but without payment it is merely the case of an unsuccessful attempt to obtain satisfaction of one person for a breach of the duty devolved upon him by his contract; and failing in that, a call upon another to respond in damages for a tortious interference with a part of the property which formed the subject-matter of the contract."⁸

SEC. 307. In a Massachusetts case, the following charge was complained of, but sustained: "The action is brought to recover damages for an alleged fraud in a contract for the purchase of a cargo of India rubber shoes. The action is for the deceit, and is not brought upon a promise on the contract, but for an alleged fraud in the sale by the defendants. And it is immaterial whether it was the fraud of one or more of

⁶ *Agnew v. McElroy*, 10 S. & M., 555.

⁸ *Hyde v. Noble*, 13 N. H., 501.

⁷ *Converse v. Colton*, 49 Pa. St., 351.

them, if there has been any fraud at all. If the defendants sent an agent to Para, and he packed the shoes artfully and fraudulently so as to deceive the plaintiffs, the defendants are answerable, as if they had all been there. It will not follow because the plaintiffs cannot substantiate this action that they cannot maintain an action upon a promise or undertaking of the defendants to do what they have not done. There must have been a fraud practiced which the defendants, or one or more of them, must have known, to render them liable in this action.”⁹ And hence the issues would not be the same in the two cases, and one would not bar the other. But if contract were brought first, and it had resulted in a decision that there had been no breach, it would have necessarily concluded the tort, because the issue of the breach would include that of the wrong doing. Even then, however, a favorable result for the plaintiff might not bar, because he might recover without showing willful deceit, and it would not, therefore, necessarily enter into the adjudication. And in New York it has been held that a recovery of judgment on a contract will not even bar a separate action for deceit originally practiced on the plaintiff to induce him to become a party to it.¹⁰ I doubt the authority of this, however, since bringing the suit on the contract would, I think, have the necessary legal result of affirming the contract. *

SEC. 308. A judgment in one suit *ex contractu* will bar another suit *ex contractu* of a different form. Thus, a party wrongfully discharged may bring an action for damages for a breach of the contract, or for the contract price. If he elects the former, a recovery would bar any further action. If the latter, he must show that he was ready and willing to perform any further services that might be required under the contract.¹¹ When he does show this, however, it is no defense that he had formerly brought an action to recover damages for the breach of contract in discharging him, and *also* a balance

⁹ *India Rubber Co. v. Adams*, 23 Pick., 262.

¹⁰ *Wanzer v. De Baun*, 1 E. D. Smith, 261.

¹¹ *Wiseman v. R. R.*, 1 Hilt., 301.

of salary due at the time of his discharge, where the claim for damages was withdrawn upon the trial and judgment rendered only for the balance of salary. In such a case he may sue successively for wages as they subsequently would become payable under the active operation of the contract, and the former suit merely for wages already due will not prevent the subsequent election either to sue thus for the wages becoming due, or for the breach of the contract once for all.¹²

SEC. 309. In the case of a warranty or fraud in the sale of chattels, the vendee has the right to retain the articles, and yet sue on a warranty thereon. But if there is no warranty or fraud in an article manufactured to order, and the purchaser accepts it, though defective, he becomes bound to pay the contract price. If, however, he rejects it, and gives notice of non acceptance, he can then bring an action for the non-performance of the contract, but he cannot accept it and then bring such an action, nor can he accept it and impose conditions, and then sue the manufacturer for not fulfilling those conditions. And a judgment recovered against the purchaser for the balance of the contract price will debar him from suing the manufacturer for a breach of the contract.¹³

SEC. 310. Where rent is payable quarterly, a lessor is debarred from bringing suit for a part of the quarter, without giving up the remainder, on the ground of the indivisibility of entire causes of action, which we have previously considered, and the adoption of a different form of action does not restore his ability to recover the remainder.¹⁴

SEC. 311. But an action of assumpsit for money collected for the plaintiff is not barred by a judgment for the defendant in a former action on a special contract to recover the same amount, if the adjudication in the former action was confined to the special contract.¹⁵

SEC. 312. A conditional judgment in Massachusetts, on a

¹² *Thompson v. Wood*, 1 Hilt., 96.

¹³ *Gilson v. Bingham*, 43 Vt., 414; *Kellogg v. Denslow*, 14 Conn., 420.

¹⁴ *Warren v. Cornings*, 6 Cush., 104.

¹⁵ *Gage v. Holmes*, 12 Gray, 428.

writ of entry to foreclose a mortgage, is held to be conclusive as to the validity of a promissory note, the amount of which is found to be due on it under the mortgage, and especially if the same grounds of defense were taken in the proceeding as are afterward taken in an action on the note.¹⁶

SEC. 313. A corporation defendant used the property of the plaintiffs in business, through a mistake of the managing agent in supposing that the corporation had purchased it, and the plaintiffs left the property in the company's possession because they expected to sell it to the company. They first brought a suit for the value of the property as on a sale, and were defeated therein, and then brought a subsequent action to recover for the use of it. *Held*, the second action could be maintained, the subject being different; one suit being for the value of the property, the other for the value of the use of it.¹⁷ On the same principle, in part, rests a case formerly cited in this work, which shows that suing for the price of articles hired does not preclude a subsequent action for abuse in using it.¹⁸ And the mere institution of an action of trover, when the action is successfully defended on its merits, has no effect on maintaining an action for hire. But the recovery of a judgment in the action of trover is held to work a rescission of the contract of hire, and so to debar a subsequent action for the price of the hire.¹⁹ And in all cases the question of ownership is held not to debar the question of use²⁰ except as above stated.

SEC. 314. A verdict and judgment on a petition for partition is as conclusive as in any other proceeding, and so may be set up as a bar to a writ of entry on the same question of title.²¹ And so, the plaintiffs in an action of ejectment cannot recover premises which have been set off to a person under

¹⁶ *Burke v. Miller*, 4 Gray, 114.

¹⁷ *Rider v. Rubber Co.*, 28 N. Y., 386.

¹⁸ *Shaw v. Beers*, 25 Ala., 449.

¹⁹ *Deens v. Dunklin*, 33 Ala., 47.

²⁰ *Cantrelle v. St. James*, 16 La. An., 443.

²¹ *Whittmore v. Shaw*, 8 N. H., 393.

whom the defendant claims by a decree in a partition suit to which the plaintiffs were parties.²² And so if a widow files a bill for partition of her husband's estate, and allows it to be partitioned thereon, and takes herself, as part of his estate, a tract of land which on partition, in her husband's lifetime, of her father's estate had been assigned to her husband and herself and her heirs, with the direction that the husband pay to other heirs of her father an excess in the value over her share, she, or her representative, is thereby debarred from afterward claiming from her husband's estate the value of her inheritance in the tract of land, because, where, in such a suit, one fails to prosecute a matter proper for litigation, he or she cannot afterward be heard on the matter.²³

SEC. 315. As to the effect of judgments in tort, on real or possessory actions, and *vice versa*, it is held in New York that a judgment for the plaintiff in an action of trespass *quare clausum fregit*, in which the defendant pleads *liberum tenementum*, is conclusive on the defendant afterward in attempting again to set up title. And yet this is stated with these limitations, that if, in the first action, the plaintiff gave a description of the close which did not embrace the whole, the matter adjudicated will be held to the particular description, even though the defendant pleaded title generally and it was found against him, because a close is not indivisible. In such a case, the court say: "It must then follow, that as the plaintiff in the action of trespass of which evidence was given in this case, might have recovered without showing an injury co-extensive with the whole close described in his declaration, and the defendant in that action might have maintained his plea by proving title to that part of the close on which the supposed trespass was committed, the right and title to the entire close could not necessarily have been in question on the trial of said cause. We cannot say, therefore, that this record is of itself a conclusive bar to the present action, for it does

²² *Doolittle v. Don Maus*, 34 Ill., 454.

²³ *Barnes v. Cunningham*, 9 Rich. Eq., 475.

not import that title to the whole of said close was in question on the trial of the cause. The verdict and judgment were undoubtedly conclusive on everything necessarily involved in the issue, or which, falling within its limits, came directly in question on the trial. But title to the entire close was not, as we have seen, necessarily in question, and no extrinsic evidence was given to show that title to the seven acres for which the present action was brought, was, in fact, in question on the trial of the action of trespass. The injury there complained of may have been done to another and distinct part of the close, and to which part alone the defendant's plea may have had reference.”²⁴

SEC. 316. And, conversely, where, in an action of ejectment, the question is the boundary line between the premises of the parties, the decision is conclusive in a subsequent suit of trespass q. c. f. between parties and privies; a judgment in ejectment being held to have equal force and efficacy with any other judgment.²⁵

SEC. 317. However, where an action of trespass was commenced before a justice of the peace, and, on the title to the *locus in quo* being brought into the controversy, was removed to a court having jurisdiction, and no judgment was rendered on the final trial respecting the title any further than it might be supposed necessary to the determination of the matter of trespass, and no determination of that issue proving to be actually necessary to render the judgment, it was held to be no bar to a subsequent action of ejectment;²⁶ although, where the defendant in an action of trespass actually puts the title in issue, and it enters essentially into the judgment, and the issue is found against him, it is conclusive in a subsequent action of ejectment.²⁷ And where a plaintiff is allowed to recover, in an action of ejectment, all *mesne* profits and all damages for trespasses occurring during the occupation, he cannot bring trespass afterward therefor,²⁸ and a judgment

²⁴ *Duncle v. Wiles*, 5 Denio., 302. ²⁷ *Shettlesworth v. Hughey*, 9 Rich, 387.

²⁵ *Beebe v. Elliott*, 4 Barb., 457. ²⁸ *Cunningham v. Morris*, 19 Ga., 583.

²⁶ *Hargus v. Goodman*, 12 Ind., 629.

for damages in an action in the nature of an action of ejectment, although such damages are merely nominal, will, in Missouri, bar a suit for the recovery of rents received prior to the judgment by the defendant from his tenant in possession.²⁹

SEC. 318. A judgment recovered against a sheriff and his sureties, in a suit on the official bond, by two joint owners of a chattel, for the wrongful act of the officer in selling the entire interest in the chattel under an execution against one of them, and in making the sale illegally, was held, in Alabama, to bar a subsequent action of trover against the officer, by the joint owner, free from the execution for the conversion of his interest in making sale of the entire chattel. And it was further held that this conclusiveness was not affected by the circumstance that only nominal damages were recovered in the first action, nor that the action itself was not properly maintainable. The court say: "Nor does it affect the question that in strictness of law the plaintiff's right could not have been properly adjudicated in the former action, if it was in fact set up and passed upon, in a court of competent jurisdiction, at the plaintiff's instance."³⁰

SEC. 319. Where an action of replevin is brought, and judgment therein obtained against one of two joint takers of goods for a part of the goods taken, this will bar an action afterward against both of them to recover damages for the same trespass, unless the remainder of the goods is shown to have been concealed, or otherwise disposed of, so that they could not be replevied.³¹ This, of course, goes mainly on the indivisibility of the cause of action, and the change in the form of action does not obviate it.

If one recovers personal property in an action of replevin, he cannot afterward be sued in trespass by the unsuccessful party for the wrongful taking of it.³²

But where A brought an action of replevin against B, and, on failing to get possession of the property, elected to proceed in case, and recovered a judgment on which execution was

²⁹ *Stewart v. Dent*, 24 Mo., 111.

³⁰ *Bennett v. Hood*, 1 Allen, 47.

³¹ *Hopkinson v. Shelton*, 37 Ala., 311.

³² *Ewald v. Waterhout*, 37 Mo., 602.

issued without result, and was returned *nulla bona*, and the plaintiff afterward found the property in the hands of a third party and replevied it, it was held that the right of property did not vest in B by the first judgment unsatisfied, so that this was no bar to the replevin suit against the third party having the property in possession.³³ And this is undoubtedly correct on principle as well as authority. And so, where a judgment in replevin was for the restitution of the property and also damages for its illegal retention, and the damages were paid but the property still withheld, the plaintiff brought an action of trover for the value, and it was held that the former recovery was no bar.³⁴ And so if, in a replevin judgment, no damages for detention are assessed, and the goods are not returned, the damage may be allowed in a subsequent action on the bond. But if the goods are returned this cannot be done, because the satisfaction of the judgment creates a bar;³⁵ and there could be no suit on the bond because its condition is fulfilled.

Where a trial of the right of property before a justice results adversely to the claimant, he cannot bring trover against the officer seizing it.³⁶ No subsequent suit, in any event, can be brought as to the same property, except, of course, on a new title subsequently acquired.³⁷

Sec. 320. It has been held, in Maine, in an early case (1827), that a judgment in trover, if execution be issued thereon, though without satisfaction, will bar an action of trespass by the same plaintiff against another person for taking the same goods.³⁸ But I think actual satisfaction would usually be required in order to constitute a bar. However, the doctrine is held somewhat modified in Rhode Island, so that if a judgment in trover be rendered for the full value of the goods converted against one of two joint feasors, it will bar an action of trespass against the other, even without execution or satisfaction.³⁹ But this is undoubtedly anomalous in its relation to American

³³ *Turner v. Brock*, 6 Heisk., 50.

³⁷ *Owens v. Rawleigh*, 6 Bush, 658.

³⁴ *Nickerson v. Stage Co.*, 10 Cal., 521.

³⁸ *White v. Philbrick*, 5 Greenl., 151.

³⁵ *Smith v. Dillingham*, 33 Me., 387.

³⁹ *Hunt v. Bates*, 7 R. I., 217.

³⁶ *Krenchi v. Dehler*, 50 Ill., 177.

Law, although the court is not without eminent English authority cited in the opinion. Having gone over the doctrines relating to the responsibility of joint trespassers in a former chapter on Joint Parties, we need not review the matter here.

SEC. 321. Where an officer is sued for malfeasance, he cannot go behind the judgment under which the malfeasance occurred for matters of defense;⁴⁰ or deny the validity of the judgment.⁴¹

SEC. 322. An action of detinue will bar a subsequent action of trover;⁴² and the contrary, provided the trover judgment is satisfied.⁴³ But in detinue the former recovery must be pleaded, in Alabama, with an averment that the plaintiff has not acquired any title since the rendition of the former judgment.⁴⁴

SEC. 323. There is no difference in the application of the rule of *res adjudicata* whether the first adjudication was had in a formal action, or in a summary proceeding, as against a receiver;⁴⁵ because, even where there is not a technical judgment in the latter, yet "it is a judicial act. It is a duty which has been confided to judicial officers, to be exercised in a judicial way. The parties and their proofs are to be heard, and their rights are to be settled by a judicial determination."⁴⁶

SEC. 324. A mere plea of not guilty, in trespass *de bonis asportatis*, of course, concludes nothing as to the right of property; and, therefore, the judgment in the trespass case will not bar a subsequent action as to the right of property.⁴⁷ But where the right of property is tried, the judgment will conclude the question in a subsequent suit for damages.⁴⁸

SEC. 325. An appeal to the Supreme Court will bar a writ of error; so that if an appellee assigns a cross-error which is decided against him, he cannot prosecute a writ of error afterward on the same point.⁴⁹

⁴⁰ *Diehl v. Holben*, 39 Pa. St., 213. ⁴⁵ *Demorest v. Day*, 32 N. Y., 290.

⁴¹ *West v. Meeserve*, 17 N. H., 434. ⁴⁶ *Supervisors v. Briggs*, 2 Denio, 33.

⁴² *Tarleton v. Johnson*, 25 Ala., 300. ⁴⁷ *Harris v. Miner*, 28 Ill., 140.

⁴³ *Thomason v. Odum*, 31 Ala., 108. ⁴⁸ *Roberts v. Heim*, 27 Ala., 678.

⁴⁴ *Patton v. Hammer*, 33 Ala., 307. ⁴⁹ *Smith v. Wright*, 71 Ill., 167.

CHAPTER XXIII.

ACTIONS RELATING TO TITLES.

- Section 326. Partition Suit not conclude Title.
- 327. Ejectment, when Conclusive.
- 328 Equitable Titles.
- 329. Subsequent Strengthening of Title.
- 330. Subsequent New Title.
- 331. Warranty.
- 332. Covenant to Uses.
- 333. Validity of Deeds.
- 334. Administrator Impeaching Intestate's Deed.
- 335. Deeds Fraudulent as to Creditors.
- 336. Ejectment and Rescission in Equity.
- 337. How far Judgment as to Fraud in Deed Concludes.
- 338. Boundary Questions.
- 339. Conflicts of Mexican Grants.
- 340. Question of Swamp Lands.
- 341. Possessory Action Merely not Conclude Title Action.
- 342. But may bar Damages for Breach of Lease.
- 343. General Judgment on Several Breaches.
- 344. Disturbance of Right by Nuisance.
- 345. Obstruction of Flowing Water.
- 346. New York Case thereon.
- 347. Overflow by Mill-dam.
- 348. Issue of Title in Suit on Note.
- 349. Fences as Realty -- Standing Timber.
- 350. Action to Set Aside Deed as Fraudulent, how bars.
- 351. Successive Grantees in Maine.
- 352. Same in Illinois.
- 353. Ejectment against Heirs by Administrator.
- 354. Chancery Decree as Title Link.

Section 355. Mortgage Titles — Fraud.

- 356. Foreclosure bars Homestead Claim.
- 357. Title to Personal Property.
- 358. Warranty as to Personal Property.
- 359. Question of Purchase.
- 360. Replevin, how far Conclusive on Title.
- 361. Notice among Successive Vendors.
- 362. Replevin under Illegal Levy.
- 363. Dismissal in Replevin.
- 394. Same Parties as to Personal Property.
- 365. Legacies.
- 366. Different Capacity of Party.
- 367. Specific Performance for Real Estate Purchase.

SECTION 326. Ordinarily, a suit in partition is not an appropriate occasion for impeaching the validity of a deed to the ancestor of the claimants, or for litigating titles. And so the result does not prevent the deed from afterward coming in question.¹ But in some States, as in Illinois, provision for trying titles in partition is made by express statute; and I suppose where this is the case the title must be tried therein, as between the parties, or be barred afterward.

SEC. 327. The action of ejectment, although originally a mere possessory action, has become the usual mode of trying real estate titles, but is treated as inconclusive often, until repeated once or twice in new trials granted as a matter of course — an absurdity which seems to have been originated by the awkward fictitious form which ejectment whimsically wore formerly, although a kind of superstitious sanctity attaching to land titles under the feudal system may have confirmed it also.² At present, when Messrs. Richard Roe and John Doe have been expelled from the arena of legal conflict, and contestants are allowed to appear *propria persona* to vindicate their rights, respectively, a judgment in ejectment ought to be clothed with the same conclusiveness attributed to any other adjudication. All might profitably follow the course of the State of New Jersey, which, twenty years ago, abolished by statute the plurality of trials in ejectment, since

¹ *McCall v. Carpenter*, 18 How., 302.

² *Miles v. Caldwell*, 2 Wall., 40.

which time the ordinary rule of *res adjudicata* applies to the judgment rendered therein;³ such, for example, as applied to trespass under which title is tried.⁴ And yet we find one of the States (Missouri) so much in love with the antiquated absurdity as to restore it again after it was fairly abolished by law.⁵ In Pennsylvania, it appears, where the rule prevails that one verdict and judgment on an equitable title will bar ejectment subsequently, it yet requires a bill in equity to confine a title question to one litigating effort; and in a case where such a bill does not lie for a definite decree, the old common law ejectment rule is still in full vigor;⁶ for it is a general principle that where an equitable defense or action does not lie, this will not debar a legal action on legal grounds, and *vice versa*; so that where the equitable adjudication is confined to a single question, as of fraud, this will not necessarily prevent an action of ejectment afterward from being successfully brought.⁷ Thus, one who has a remedy at law to try his real estate title cannot bring a bill in equity to quiet title. And so, where, in an action to quiet title, the court adjudicates the question and finds that the plaintiff has no title, and dismisses the bill, and the appellate court affirms the dismissal, but on the ground merely that the plaintiff has a legal remedy, the finding of the court below on the question of title will be vacated, and the plaintiff may proceed at law.⁸

SEC. 328. As to equitable titles themselves, they are not necessarily concluded by an action of ejectment wherein the judgment goes no farther than to establish the legal title;⁹ and although one may have a remedy at law he may nevertheless go into equity unless that legal remedy is complete.¹⁰

SEC. 329. Where a defendant has failed in a real action, and judgment has been rendered against him on the sole ground that his grantor was disseized at the time of conveying to him, and he has subsequently fortified his title in this

³ *Van Blarcom v. Kip*, 2 Dutch., 352. ⁷ *Gamble v. Voll*, 15 Cal., 510.

⁴ *Dick v. Webster*, 6 Wis., 481.

⁸ *Gray v. Tyler*, 40 Wis., 579.

⁵ *Slevin v. Brown*, 32 Mo., 176.

⁹ *Hill v. Oliphant*, 41 Pa. St., 377.

⁶ *Taylor v. Abbott*, 41 Pa. St., 352.

¹⁰ *Jordan v. Faircloth*, 27 Ga., 372.

respect, he may bring a new action to recover the same premises, and therein prove, by parol evidence, that the former judgment rested on that ground, although there was another ground of defense at issue, and evidence was offered on it by both parties.¹¹

SEC. 330. And of course where one fails to establish title, and afterward acquires a new or partially new title, the former action does not debar him from seeking to recover on the subsequent acquirement.¹² The former judgment merely settled the fact of title at the time it was rendered; but the second suit relies on a different title, and so is, in reality, not on the same issue.¹³ For example, if one claimed title by inheritance, and is defeated in trying title on partition, and afterward he sets up a claim under a spoliated will, which had been meanwhile restored and admitted to probate, this will be held a new title, and his action can be maintained notwithstanding his former failure.¹⁴ Or if one brings suit as an assignee to foreclose a mortgage, and fails because of a defect in his assignment, he can proceed to perfect his assignment and renew the foreclosure proceedings, for "when he reappears with the bond and mortgage, and the deed or deeds of assignment in his hands, perfect and complete, it cannot be said that the question which he proposes to litigate is *res adjudicata*."¹⁵

SEC. 331. However, where "a warrantee in *warrantia chartæ* recovers, and has seizin of other lands of the warrantor to the value, he cannot afterward recover of the warrantor the lands warranted. For, although the warrantor cannot aver against his own deed, yet the warrantee may aver against that deed, and if his averments are verified by matter of record, the warrantor may afterward avail himself of that

¹¹ *Perkins v. Parker*, 10, Allen, 22; 121 Mass., 1.

¹² *McKissick v. McKissick*, 6 Humph., 75; *Taylor v. McCrackin*, 2 Blackf., 261.

¹³ *Adams v. Gillespie*, 2 Jones Eq., 244.

¹⁴ *Woodbridge v. Banning*, 14 O. St., 330.

¹⁵ *Mitchell v. Cook*, 29 Barb., 254.

record against the warrantee, the record being of higher nature than the deed.”¹⁶ And where one conveyed land with covenants of warranty, and his wife joined in the deed to release her dower claim, and afterward the purchaser recovered on the warranty because of a defect in the title, it was held that the wife was not barred of her dower by her uniting in the conveyance.¹⁷

SEC. 332. A deed from a father to his daughter purported to convey to her the fee simple of certain real estate, with the reservation of a life occupation thereof—the deed expressing a pecuniary consideration in the usual form. It was held that, although as a deed of bargain and sale of a fee simple to commence *in futuro* it could not take effect, yet as a covenant to stand seized to uses it was valid; as the law, in such a case, presumed a consideration of consanguinity. Also, that the daughter acquired not merely a springing use but a vested remainder, and that a subsequent recovery in a writ of right by a third person against the father did not defeat such remainder; the daughter not being a party to the suit nor a privy in estate.¹⁸

SEC. 333. The validity of deeds is, of necessity, a prominent subject of litigation in respect to titles of real estate. It is held that if a deed under which a defendant makes his defense tends to show a title to other property which was embraced in the plaintiff's deed but which is not included in the suit, the verdict and judgment thereon will not be evidence in a subsequent suit on the warranty to show the plaintiff's right to recover for that also; because the deed would not have been in question as to its validity any farther than the property involved in the prior suit, on the principle that the former trial could not furnish evidence in relation to matters which were tried but were not within the scope of the warranty, or matters which being within the scope of the warranty were not in issue and therefore settled.¹⁹

¹⁶ *Porter v. Hill*, 9 Mass., 36.

¹⁷ *Stinson v. Sumner*, *Ibid.*, 138.

¹⁸ *Bremer v. Hardy*, 22 Pick., 380.

¹⁹ *Andrews v. Denison*, 16 N. H., 475.

SEC. 334. Whether an administrator can impeach for fraud the deed of his insolvent intestate, seems not to be fully settled; although it is held that where a fraudulent deed has not been delivered in the life time of the grantor, who dies in possession, and there is a grant of administration before the donee takes possession, the property is assets in the hands of the administrator (being personal property, or such as slaves). And a prior judgment will not debar him from bringing an action to recover the property on the allegation of invalidity in the deed from his intestate, under which the plaintiff had claimed title, this question of invalidity having been litigated in the prior action.²⁰ But where a complaint has been filed by a mortgagor to set aside a mortgage, and dismissed on hearing, he cannot be allowed afterward to set up its invalidity as a defense in a suit of foreclosure.²¹

SEC. 335. The most prominent and frequent point made as to the invalidity of deeds is upon alleged frauds against creditors. A case arose in St. Louis of which I avail myself by quoting the syllabus of the reporter, *verbatim*: "A having purchased certain lots in the city of St. Louis at an execution sale, under judgments against B, brought suit against B, and also against C, in whom the legal title to said lots stood, asking that the title of C might be divested and transferred to A, on the ground that the said lots had been conveyed to C with intent to defraud the creditors of B (of whom A was one) and were thus fraudulently held by C. To this suit both defendants appeared, and B, in his answer, denied the fraud alleged, denied ownership in himself, and asserted full ownership in C. The court gave judgment for A, the plaintiff, and by its decree vested the title to the said lots in him, free and discharged of all claims in favor of either B or C. *Held*, that this suit was a complete and final adjudication upon the title of B to the lots in question; and that B could not afterward set up title thereto, either in his own behalf or in behalf of

²⁰ *Hunt v. Butterworth*, 21 Tex., 183.

²¹ *Building Association v. Reynolds*, 5 Duer, 671.

his creditors, on the ground that A acquired the property by making a fraudulent use of a judgment confessed by B in his favor.”²²

SEC. 336. It is held, in California, that when the grantee of a deceased person obtains a judgment against the executor in ejectment, this will not debar either the executor or the creditors from filing a bill in equity in order to set aside the deed on which the judgment in ejectment was obtained, as having been executed to defraud creditors;²³ because only in equity can adequate relief be obtained against such fraudulent deed.

SEC. 337. An adjudication that a deed is fraudulent against creditors only affects the grantees so far as such creditors' interests and rights are concerned, and it has been held that other creditors cannot avail themselves of such an adjudication made in a suit where they were not parties;²⁴ but must proceed anew for themselves. And so it was held error to permit a defendant to use a former record against attaching creditors not parties to the prior suit, in order to disprove the charge of fraud as to creditors against his conveyance.²⁵

SEC. 338. Questions of boundary often arise in connection with disputed titles. And where a boundary line has been adjudicated as the issue in a cause, being essential, it will be conclusive afterward,²⁶ unless a new purchase is alleged and shown; and not only upon parties, but also upon one who as grantor of a portion of the land included in disputed boundaries is in privity of interest with the defendant, and who conducts the defense.²⁷ But it cannot, on the usual ground, be conclusive on other parties.²⁸ And a mere question of boundary cannot be conclusive on the question of title.²⁹

²² *Franklin v. Stagg*, 22 Mo., 193.

²³ *Hills v. Sherwood*, 48 Cal., 386.

²⁴ *Huntington v. Jewett*, 25 Iowa, 249.

²⁵ *Norcross v. Hudson*, 32 Mo., 227.

²⁶ *Curtis v. Francis*, 9 Cush., 464.

²⁷ *McNamee v. Moreland*, 26 Iowa, 97, 113.

²⁸ *Stinchcomb v. Marsh*, 15 Gratt., 202.

²⁹ *White v. Purnell*, 14 La., 232.

SEC. 339. Conflicts of actual surveys have given rise to much controversy, in our acquisitions from Mexico especially; concerning which the Supreme Court of the United States remarks: "No class of cases that come before this court are attended with so many and such perplexing difficulties as these locations by survey of confirmed Mexican grants, in California. The number of them which we are called upon to decide bears a very heavy disproportion to the other business of the court, and this is unfortunately increasing instead of diminishing. Some idea of the difficulties which surround these cases may be obtained by recurring to the loose and indefinite manner in which the Mexican government made the grants which we are now required judicially to locate. That government attached no value to the land, and granted it in what appears to us magnificent quantities. Leagues, instead of acres, were their units of measurement, and when an application was made to the government for a grant, which was always a gratuity, the only question was whether the locality asked for was vacant and was public property. When the grant was made, no surveyor sighted a compass or stretched a chain. Indeed, these instruments were probably not to be had in that region. A sketch called a *diseño*, which was rather a map than a plat of the land, was prepared by the applicant. It gave, in a rude and imperfect manner, the shape and general outline of the land desired, with some of the more prominent natural objects noted on it, and a reference to adjoining tracts owned by individuals, if there were any, or to such other objects as were supposed to constitute the boundaries. Their ideas of the relation of the points of the compass to the objects on the map were very inaccurate; and as these sketches were made by uneducated herdsmen of cattle it is easy to imagine how imperfect they were. Yet they are now often the most satisfactory, and sometimes the only evidence by which to locate these claims. These difficulties have rather been increased than diminished by the Act of Congress of March 3, 1851, entitled 'An Act to ascertain and settle the private land claims in the State of California.' * * *

Then came the Act of 1860, which attempted to settle these difficulties in the making of the surveys under those decrees, by permitting, or perhaps we should say compelling (for it is yet to be determined whether every one interested is not bound to come in or be barred) all parties interested in the land covered by the survey to come in and contest it. Are they permitted to contest the decree under which the survey is made? Or are they limited to denying that the survey conforms to the decree? Or can they only contest the matter where the decree has not definitely located the grant? Many such questions as these will arise under this act, and will require great care and reflection to arrive at sound, safe conclusions. In this proceeding new parties come before the court, and often demonstrate that grants have been confirmed which necessarily conflict; and upon the question of the location of a survey we have all the contests renewed which should have been settled in the question of title.”³⁰

Manifestly, in such an intricate tangled web of claims and counterclaims, it is a hard matter to determine sometimes what questions have become *res adjudicata*, since the merits are liable to be twisted into a thousand forms, and the spirit of litigation to become as irrepressible as Banquo’s ghost. Nevertheless, the courts are bound to entertain these questions, and tolerate the spirit of excited controversy in relation to them, in proportion as the lands involved in these grants become more valuable under the influence of our Anglo-Saxon push and enterprise. Of course, the main burden of invoking order out of this chaos devolves on the courts of California, and other states subject either to Mexican or Spanish grants, which have been made with so much recklessness by wild adventurers first, and then by governments almost as wild as they, that they are very prone to overlap, to the great confusion and perplexity both of the claimants and the courts.

The California court has indeed addressed itself, with much ability, to the task before it in this direction, and has met with commendable success in laying down general principles

³⁰ *Rodrigues v. U. S.*, 1 Wall., 587, *passim*.

and rules to control the emergency. In the *first* place, it has held that the proceedings under the act of Congress of 1860, after a Mexican grant has been surveyed and platted and due return thereof made to the District Court, are to be regarded as strictly of a judicial character, so that the decree of the court rendered on the survey constitutes the matter *res adjudicata*, and therefore final and conclusive upon the rights of all the parties to it. *Second.* That if, after a decree under that act, in confirmation of the required survey, another decree is made, conflicting (as the grants themselves had done), by confirming a survey of another prior grant covering the same lands, and the confirmee in the first decree is a party to the second decree, consenting thereto, he is bound by it.³¹ *Third.* If two Mexican grants to different persons are confirmed and surveyed so as partly to overlap, and the owner of one becomes a party to the proceedings for the confirmation of the other, he is bound by those proceedings, and cannot afterward deny that this grant was properly located by the survey. *Fourth.* If two Mexican grants are so confirmed, at different times, as to overlap, and the owner of the one last confirmed is a party to the proceedings confirming the other, and the owner of the one first confirmed becomes a party to the proceedings of the last confirmation, and fails to set up the first confirmation as a bar to the proceeding, he cannot afterward attack the last decree.³² *Fifth.* The confirmation is binding upon all persons, whether they do or do not formally intervene³³ [I suppose if they might intervene]. *Sixth.* Third persons within the Act of Congress of 1851, against whose interest the final confirmation of a Mexican grant is not conclusive, are only such as have a claim of title which they could make effective against the government of the United States itself, under the law of nations, and the treaty of Guadalupe Hidalgo, so that one claiming under an inchoate Mexican grant which has been confirmed, and the final survey of which has been made under

³¹ *Treadway v. Semple*, 28 Cal., 652.

³² *Semple v. Wright*, 32 Cal., 659.

³³ *Yates v. Smith*, 38 Cal., 60; and 40 Cal., 662.

the Act of Congress of 1864, is not such third person.³⁴ *Seventh.* If a claimant of a Mexican grant which gives a perfect title presents it to the Board under the Act of 1851, for confirmation, and it is thereon surveyed and a patent is issued, but the survey does not include all the juridical measurement of the Mexican government, he cannot afterward claim that portion thus excluded from the survey.³⁵ Such are the leading rules developed for determining the numerous claims of Mexican grants in the state of California, and which are probably destined to undergo great varieties of application, and perhaps some modifications, in bringing all into harmony and legality.

SEC. 340. In California, also, it is held that if the validity of a certificate of purchase of swamp and overflowed lands from the state is tried in an action to which the state is not a party, and if, likewise, the fact is put in issue and tried in the action whether the lands are swamp and overflowed, and if the determination is that the certificate is invalid, and that the lands are not swamp and overflowed, the judgment is conclusive against the parties and their privies, and they cannot afterward prove that the land is swamp and overflowed, and therefore the property of the state. The court say on this matter: "The state was not a party to the suit, and of course is not bound by the judgment. But the character of the land as being swamp and overflowed, or otherwise, was directly in issue, and was submitted to a jury for determination, and a verdict was rendered. It may be conceded, for the sake of the argument, that a special verdict in an equity case is only advisory, and may be entirely disregarded by the court, and would not, therefore, necessarily have the conclusive effect of a final adjudication. But it sufficiently appears here that the verdict was adopted by the court, for the subsequent examination of the case purports to have been for the determination of 'remaining issues,' and the findings of the court to have been 'in addition to the facts found by the jury.' The right

³⁴ *Miller v. Dale*, 44 Cal., 562.

³⁵ *Cassidy v. Carr*, 48 Cal., 399.

of the then plaintiff to the possession of the quarter section in controversy depended both upon the character of the land and the regularity of his proceedings to obtain the title of the state, if it should be found to be swamp or overflowed; and the fact that the divided three-quarters were not swamp or overflowed was found by the court and determined by the judgment, as well as the other fact of the entire invalidity of plaintiff's proceedings to procure the title. We are of opinion, therefore, that the court did not err in enforcing against the defendant in this case the well-settled rule that prohibits a party from agitating a second time a question which has been once finally determined between the same parties by the judgment of a court of competent jurisdiction.³⁶

SEC. 341. In real actions, a merely possessory action can only bind another possessory action, and cannot bind one of a higher nature, as, for example, a writ of right is not barred by a writ of partition, the latter being simply possessory, and the former being based on the mere or absolute right.³⁷ And it is certain that one may be entitled to the possession and yet not be the owner. Accordingly, where a writ of entry is brought, wherein the plaintiff seeks to recover as owner, and is defeated, he will not thereby be debarred from prosecuting a subsequent action against the defendant for an injury to his possession of the same premises.³⁸

SEC. 342. The judgment in a possessory action brought by a grantee against one claiming to hold under an agreement for a lease with the grantor, rendered in favor of the plaintiff, will be held conclusive against the defendant in an action against the grantor for damages growing out of the breach of the alleged agreement for the lease, on the ground of privity between the grantee and grantor.³⁹ But where a certain town leased land bounded on the north by the north line of the town, and the lessee, being evicted, brought an action against the town for the breach of the covenant of quiet enjoyment, and on the trial offered the record of the judgment of eviction,

³⁶ *Clink v. Thurston*, 47 Cal., 30.

³⁸ *Stevens v. Taft*, 8 Gray, 420.

³⁷ *Mallett v. Foxcroft*, 1 Story C. C., 476.

³⁹ *Sobey v. Beiler*, 28 Iowa, 323.

which, however, appeared to cover only land bounded on the south by the north line of the town, he then offered to prove, in order to establish eviction from a portion of the land included in the lease, that the true north line of the town was twelve rods further north than such north line as established in the judgment of eviction against him which he offered in evidence. It was held that he could be allowed to do so, because, as the town was not a party to the action by which he was evicted, and wherein the judgment was rendered, it was not conclusive either for or against the town, it having not been cited in to defend the action. The court said: "It is the common case of a warrantor, or covenantor, who, not being vouched in to defend, has no control over, and is not bound by the proceedings in the suit. Not being concluded by the record, the defendant has not the right to insist that the record shall conclude the plaintiff, for both must be bound, or neither. We think, therefore, the court below erred in holding that the judgment was conclusive of the fact that the land recovered was in Dover, and that parol evidence was not admissible to show that it was in Marlboro."⁴⁰

SEC. 343. We find another limitation of the doctrine of *res adjudicata* in cases where an action is brought for several breaches of covenant in a lease of real estate, and a general verdict and judgment are given for nominal damages merely. Such a judgment is not, of itself, conclusive evidence of one of the breaches in a subsequent action against the lessor by the lessee for entering and expelling him from the land for such breach. But it may be shown that the issue on that particular covenant was adjudicated in the former action, and then the judgment thereon will be conclusive.⁴¹

SEC. 344. In Indiana it has been held that where an action has been brought for damages in the disturbance of a right by a nuisance, and a verdict is given for the plaintiff under the general issue, and afterward a suit is brought for a continuance of the nuisance, and the general issue is again pleaded,

⁴⁰ *Knapp v. Marlboro*, 31 Vt., 677. ⁴¹ *Sawyer v. Woodbury*, 7 Gray, 499.

the former judgment may be admitted as relevant, and very strong proof of the plaintiff's right to recover, and also is admissible to enhance the damages, although it is not held conclusive,⁴² the issue not being precisely the same, as the second action is based on the continuance. But this ruling is certainly somewhat anomalous, and can never be a general precedent.

SEC. 345. Where one brings an action at law for obstructing the flow of water to his mill, and a plea is entered of not guilty, and also a specification of defense denying both the plaintiff's right and any injury thereof, and on the trial the plaintiff is defeated, the judgment will not debar him from bringing another suit in equity to restrain the obstruction, unless it appears from the record, or by parol, or other evidence, that the defendant did not prevail in the legal action for want of proof that he had violated the plaintiff's right, since, from the general nature of the plea of not guilty, it cannot be decided on the record whether the verdict is on the ground of the want of the plaintiff's right, or on the ground that the defendant had done no act to contravene that right.⁴³

SEC. 346. On the matter of obstructing water courses, a case arose in New York, of which a good idea can be obtained by the full and accurate syllabus of the reporter, of which I avail myself *verbatim*, namely:

"In an action brought to establish the right of the plaintiff to have an alleged stream of water running, as claimed, over the land of both parties, to run and flow, as it had been accustomed to do time out of mind, and to recover damages for an alleged obstruction of the stream made by the defendant on his own land, the judge found as facts that there never had been, since the plaintiff and defendant owned co-terminous lots of land, any natural stream or channel of water which had been accustomed to flow over the lands of the parties, and that the defendant had not placed or maintained any obstruction to the flow of water in any such natural stream. *Held*, that

⁴² *Miles v. Wingate*, 6 Ind., 459, affirming *Haller v. Pine*, 8 Blackf., 175.

⁴³ *McDowell v. Langdon*, 3 Gray, 513.

a judgment in favor of the defendant dismissing the complaint was properly directed to be entered.

"A judgment for the plaintiff in an action brought in a justice's court 'for obstructing the passage of water over the defendant's lot,' no such claim as the existence of a water course being referred to in the complaint, will not estop the defendant from denying the existence of an alleged water course over the land of both parties, in a subsequent action brought by the same plaintiff against him to establish the right of the plaintiff to have an alleged stream of water running as claimed over the plaintiff's and defendant's lots continue to run and flow as it had been accustomed to do, and to recover damages for an obstruction.

"The principles which apply to the obstruction of running streams do not govern in the case of waters running under the soil.

"One is not obliged to excavate ditches, or construct sewers on his own land, for the purpose of draining the low or marshy lands of an adjoining proprietor. And in respect to the running off of surface water caused by rain or snow, there is no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it.

"A recovery upon no title alleged, but which is based wholly upon a misunderstanding of the law, though it will be binding in the particular case, will not estop a party from asserting any right of which he can avail himself in a subsequent litigation."⁴⁴

As to the last clause—although given in almost the exact language of the court—there appears to be a want of clearness or definiteness. From the context in the opinion itself, I infer the meaning is that where "no title" is alleged, but the action merely proceeds on a misunderstanding of the law, there the title not being litigated is not concluded for any

⁴⁴ *Goodale v. Tuttle*, 29 N. Y., 459.

future litigation. This is in accordance with the general rule; indeed, but I know not why it was thus stated.

SEC. 347. A question of title, litigated in an action on the case for overflowing lands by constructing a mill-dam, will be conclusive in a subsequent action for the continuance of the nuisance. In such a case the plaintiffs had been successful in the first suit. In the second a plea of justification was set up by means of a claim to the freehold, and a deed was produced in evidence, the existence of which the defendant had attempted to prove on the former trial. The former recovery was given in evidence, likewise, under the general issue. It was held that this concluded the matter of title, so far as it was involved in the former action, and, therefore, that as the defendant had failed before to prove his deed, he could not then be allowed to do so as a defense to the suit for the continuance.⁴⁵

SEC. 348. Where suit is brought on a promissory note, and the sureties thereon set up the defense that a deed to a certain tract of land has been given by the principal in satisfaction of the note, and the case is tried on that issue and results for the defendants, this is *res adjudicata* as to that issue, so that it cannot be re-litigated in a subsequent action to recover possession of the land, by any of the parties, because "there may be a judicial determination of a fact, as well as a judicial determination of a case. A case is a series of material facts necessary to a judgment. Each of these material facts must, in effect, be found by a court, or a jury, before the final judgment can be rendered. This final judgment is the conclusion of law arising from the material facts found. When such facts are found and judgment rendered thereon they become settled and determined, for all time, as between the parties, and cannot be disputed or denied by either of them, whenever or however met. Where the pleadings are general, the judgment is conclusive of those facts which the court or jury must have found."⁴⁶

⁴⁵ *Jones v. Weathersbee*, 4 Stroh., 50.

⁴⁶ *Jackson v. Lodge*, 36 Cal., 31, and many cases cited.

SEC. 349. In Wisconsin, it is held that a fence is a part of the realty; and so, if, in an action before a justice of the peace, there is a dispute between the parties as to the title to a division fence, this is a question as to the title to land, which, on proper steps being taken, will oust the justice of jurisdiction.⁴⁶ And so of standing timber, the purchaser of which takes an interest in the land, so that a dispute concerning it raises a question of title to real property, notwithstanding the ownership of the soil is not transferred⁴⁷—so that such a purchaser, as a privy in estate, is bound by a former adjudication in which the owner was a party, relating to the title.⁴⁸

But, in Massachusetts, it is held that a judgment in an action for the conversion of a standing tree is not conclusive evidence of title in a writ of entry to recover the land on which the tree grew, although with proof that the only question litigated in the controversy concerning the tree was one of title; on the ground that the seizin could not enter into the first judgment, but merely the right of possession to the tree itself, and not even the possessory right in the land; and also that in any case a judgment in an action of trespass q. c. f. on an issue joined upon the plea of soil and freehold, is not conclusive evidence in a writ of entry.⁴⁹ This doctrine seems more consonant with the general principles governing matters of title.

SEC. 350. Where an action is brought against two defendants to set aside a deed of land from the one to the other as a fraud upon the plaintiffs as creditors of the vendor, the former judgment by the plaintiffs against the vendor is admissible evidence, and conclusive that the grantor owed the amount thereof when the suit was brought in which the judgment was rendered; and it is also *prima facie* evidence of the same facts on proof of the cause of action. But as to the validity of the deed in question, it has no effect, even if both vendor and vendee were named in the former suit as defendants,

⁴⁶*Murray v. Van Derlyn*, 24 Wis., 67. ⁴⁸*Warner v. Trow*, 36 Wis., 200.

⁴⁷*Strasson v. Montgomery*, 32 Wis., 56. ⁴⁹*Johnson v. Morse*, 11 Allen, 541.

and the complaint stated the same facts to impeach the deed as the complaint in the second action, if the vendee was not served with the first summons and did not appear in the first action. None of the parties can use the judgment as conclusive on the validity of the deed, because the parties are different; even if the validity of the deed was a relevant question in the first suit.⁵⁰

SEC. 351. In an early case, in Maine, it was held that where one conveys real estate to another, who again sells and conveys it, and afterward commences an action against his grantor on the covenants of his deed, the result of this action does not bind his grantee, because the judgment is obtained after the date of the second grantee's deed, and he is not made party to the proceedings, and is not such a privy as to bind him by the judgment in the action of warranty.⁵¹

SEC. 352. But, in Illinois, it is held that where a grantee brings an action of covenant against an original warrantor, and obtains a judgment therein, this can be pleaded in bar to any action brought by any intermediate grantee — so that it is not necessary in such action that it should be alleged that the intermediate grantees had kept their covenants, since they are not in the case — the plaintiff being the last assignee, and so the only person injured.⁵²

SEC. 353. In Vermont, a recovery in ejectment against heirs or devisees by an executor or administrator of the estate is conclusive at law as to his right to the possession of premises, and also as to the right of a succeeding administrator *de bonis non* — as where the recovery is for the non-fulfillment of a condition in the will.⁵³ And, in any case, a judgment by default, in ejectment, will bar a subsequent action by the defendant to recover the premises — except a second action or second trial be provided for by statute; and then only in the mode prescribed can the matter be re-litigated.⁵⁴ However,

⁵⁰ *R. R. v. Kyle et al.*, 5 Bosw., 587.

⁵¹ *Winslow v. Grindal*, 2 Greenl., 64.

⁵² *Brady v. Spurck*, 27 Ill., 481.

⁵³ *Payne's Adm'r v. Payne*, 29 Vt., 174.

⁵⁴ *Doyle v. Hallam*, 21 Minn., 515.

if a defendant acquires a new right, he can base a new action thereon, for then the substance of the issue is not the same as that before litigated, since this included the title only as it then stood, but the second suit the title as it is after the change.⁵⁵

SEC. 354. A chancery cause may be legal evidence as a link in the chain of title for a defendant, although the plaintiff was not a party to the cause, on the ground that "a judgment or decree is always evidence of the fact that such judgment or decree was rendered, and of the legal consequences of that fact, whoever were the parties to the suit in which it was rendered; and where a title is derived under a decree, it is necessary to establish its existence in order to show the legal validity of the deed made under its authority; and the admissibility of the record for that purpose as a fact introductory to a link in the chain of the title and constituting a part of the muniments of the party's estate, is a matter of familiar recognition and constant practice."⁵⁶

SEC. 355. As to mortgage titles, one who is a party to a foreclosure suit cannot afterward, in an action of ejectment, brought on an official deed executed under the decree of foreclosure, set up in defense a title which was adjudicated against him in the foreclosure suit.⁵⁷

But where one claiming to be a *bona fide* purchaser of real estate has made a verbal contract for the sale of it, and the proposed purchaser from him has entered into possession, and the proposed vendor has no notice of the foreclosure of a mortgage of prior date — on which a writ is served merely on the occupying tenant under the verbal contract of purchase — the decree does not debar him from afterward impeaching the mortgage on the ground of fraud.⁵⁸ But if a mortgage be merely void and not fraudulent, a decree will be conclusive

⁵⁵ *Mahoney v. Van Winkle*, 33 Cal., 458.

⁵⁶ *Baylor's Lessee v. Dejarnette*, 13 Gratt., 163; 1 Stark. Ev., 18'; 1 Greenl. Ev., Sec. 538; *Barr v. Gratz' Heirs*, 4 Wheat., 213.

⁵⁷ *Clark v. Boyrean*, 14 Cal., 635.

⁵⁸ *Warren v. Cochran*, 7 Foster, 339.

as to all who are actually made parties.⁶⁹ And even evidence of fraudulent representations in procuring the execution of the mortgage cannot be made available in an ejectment suit brought for premises sold under the mortgage when the same defense had been ineffectually set up in a prior *sci. fa.* on the mortgage, and on a rule to open the judgment entered on the bond secured by it; or even if there was opportunity to set up the defense, which was not availed of by the parties.⁷⁰ And the rule is the same if one having an indemnity mortgage to counteract another mortgage fails to set it up in the foreclosure of the latter, having opportunity to do so, in order to have his equities adjusted thereunder.⁷¹

SEC. 356. Where a mortgage is foreclosed against a husband and wife, and a purchaser under the decree brings an action to recover the property, the wife cannot set up in defense that the mortgaged property was her homestead, unless fraud is alleged—even if the purchaser was the plaintiff in the foreclosure suit—the latter conclusively settling the rights of the parties.⁷²

SEC. 357. We now come to the subject of title to personal property.

In Louisiana, it is held that where a suit is brought by attachment against the supposed owner of personal property, and the articles seized are released upon bond by such supposed owner, the record of the suit is not admissible as evidence of real ownership in an action between other parties where the question relates to titles—but a judgment changing the ownership of the property is admissible in the same manner as a private writing, although the plaintiff in the pending action had no connection with the former one.⁷³ No reason is given by the court for this decision, and I do not comprehend on what basis it rests. It is also held that where property is seized by creditors of a vendor, and the title thereto is decreed to be fraudulent in a suit to which the vendee is a

⁶⁹*Butterfield's Appeal*, 77 Pa. St., 197. ⁷⁰*Lee v. Kingsbury*, 13 Texas, 70.

⁷⁰*Lewis v. Neuzel*, 38 Pa. St., 225. ⁷³*Snapp v. Porterfield*, 14 La. An., 405.

⁷¹*Briscoe v. Lloyd*, 64 Ill., 33.

party, this judgment will conclude the vendee's claim to the title, but not as to other claims on the property; and if he has any right to claim any portion of the price, he should have an opportunity of showing it; and although he could not enjoin the sale, yet he might have a claim to be enforced on the proceeds.⁶⁴

SEC. 358. A suit brought on an implied warranty of title in the sale of personal property may be sustained by evidence of a former action against the vendee by one having paramount title, if it be shown that the vendor had sufficient notice of the former suit while pending.⁶⁵

SEC. 359. Plaintiffs brought an action against defendants (a corporation) for the use of certain machinery worn out in the business of the defendants. A defense was set up that the plaintiffs were officers of the corporation by which they were authorized to buy of a third party \$30,000 worth of machinery, etc., in a manufactory, of which defendants took possession under the purchase, and used the machinery in question supposing it to belong to the purchase. A judgment was produced in evidence, whereby it appeared that the plaintiffs had brought a former action against the defendants, in which they alleged a sale to the defendants of the same machinery, and claimed the price; on which allegation issue was joined, the defendants denying the purchase. On this, judgment was rendered for the defendants. It was held that the defense set up in the pending action was not debarred by the former judgment, but that the defendants could be allowed to prove the purchase from such third person, by them, of the machinery. The judgment was conclusive between the parties on the question therein involved, namely: whether the defendants purchased from the plaintiffs. But they could be permitted to show that, by virtue of the purchase from the third party, and the plaintiffs' consent to it, they had acquired title in that manner.⁶⁶

⁶⁴ *Wilson v. Curtis*, 13 La. An., 601. ⁶⁶ *Rider v. Rubber Co.*, 4 Bosw., 176.

⁶⁵ *Marlatt v. Clary*, 20 Ark., 251.

SEC. 360. The ordinary mode of trying title to personal property is by a writ of replevin, although the effect of a verdict against the plaintiff in this action where the defendant merely puts in issue the allegations of the complaint or declaration, is not necessarily conclusive on title, because it may have been found that the defendant did not take or detain the property simply. But it may be proved that the title was actually litigated, and then it will be conclusive. If several chattels are taken, and a final judgment is recovered for a part only, where the title to the whole is contested, the plaintiff cannot subsequently bring another action of replevin, and therein again litigate the title, unless he has acquired a new title after the former suit.⁶⁷ However, if only the property, or present right of possession, be put in issue, the judgment thereon will not bar a subsequent litigation of the question of absolute ownership.⁶⁸

SEC. 361. If a purchaser, or any subsequent vendee, be sued in any action involving the question of title, the vendor will be concluded if notified of the pendency thereof; and it makes no difference that the article is repeatedly sold, and that the suit is against the last vendee, if the question of title is the only one litigated. Thus, where horses were exchanged, and plaintiff sold the horse he received from the defendant, and the purchaser again sold it, and afterward it was replevied in the possession of the last vendee, who notified his vendor, and a similar notice went back along the whole line to the defendant, who neglected to defend the suit, the judgment was held conclusive on the defendant. Yet where there is a succession of transfers, and judgment is rendered against the last holder, any seller may show that the defect originated after he parted with the property, and he therefore had no interest in the determination of the question.⁶⁹

SEC. 362. Where property is replevied under an alleged illegal levy, and the plaintiff is defeated on the trial, it will be presumed that the legality of the levy was settled in the

⁶⁷ *Angel v. Hollister*, 38 N. Y., 378.

⁶⁸ *Thurston v. Spratt*, 52 Me., 205.

⁶⁹ *Emmons v. Dome*, 2 Wis., 322.

action; and in the absence of any showing to the contrary, this presumption will be afterward held conclusive.⁷⁰

SEC. 363. Where, in replevin, the plaintiff fails on the trial, or dismisses the suit without trial, and the court only orders a return of the property, the plaintiff afterward, when sued on the bond, may be permitted to show that the defendant had only a contingent interest therein, or that it was the property of another; but where the court determines the whole controversy, on issue joined, the judgment is necessarily conclusive on all issues, including the question of ownership, as to parties and privies. And that the party introduced no evidence does not destroy the conclusiveness thereof. Nor that the judgment was inadvertently rendered by the court.⁷¹ And the same matters, therefore, cannot again be litigated in an action on the replevin bond.⁷²

SEC. 364. Where several defendants are sued for the use of personal property, and title is set up in defense, the plaintiff cannot avail himself of a former judgment recovered against the defendants *and an officer* for attaching the property as the property of another person, because of the difference in the parties.⁷³

SEC. 365. As to legacies, the following case arose in Connecticut, and was decided by a divided court. An executor was sued on his bond, various laches being assigned, among which was the charge that he had neglected and refused, on demand, to pay over money in his hands to his successor; on which judgment was rendered against him. On a *scire facias*, brought subsequently on this judgment, it appeared the testator had bequeathed various legacies payable as the legatees came to the age of eighteen years. It also appeared that at the time of the former trial the legatees were under that age; and that the executor had money in his hands sufficient to pay the legacies; and that, on the trial, no claim was made or evidence offered as to the non-payment of the legacies, and

⁷⁰ *McDaniel v. Fox*, 77 Ill., 343.

⁷² *Denny v. Reynolds*, 24 Ind., 248.

⁷¹ *Hayden v. Anderson*, 17 Iowa, 158.

⁷³ *Wing v. Bishop*, 3 Allen, 457.

this was not considered by the court, or included in the judgment, since the action had been instituted and prosecuted solely for the benefit of those entitled to the residuum of the estate left after the payment of the legacies. It was held, by three judges against two, that the former judgment must be considered as covering the whole ground, and as constituting a bar to any claim for the legacies in the *scire facias*; as the cause of action was essentially the same in both suits. The duty of the executor was merely to pay over the money to the new administrator when he was deprived of his office.⁷⁴

SEC. 366. Where a daughter in a proceeding for the settlement of her father's estate contested the validity of a payment by the administrator to her husband, in which she was defeated, she cannot afterward, as administratrix of her deceased husband, on the settlement of her accounts, again question the validity of the payment by claiming the amount as her own separate property, and not as a part of her husband's estate.⁷⁵

SEC. 367. Where a vendee brings an action against the heirs of the vendor for a specific performance of a contract for the purchase of real estate, and the court renders a decree for the performance, the decree is conclusive on all material questions before the court, and therefore bars a subsequent action brought by an assignee of the vendee to rescind the contract.⁷⁶

⁷⁴ *Pinney v. Barnes*, 17 Conn., 427. ⁷⁶ *Tompkins v. Hyatt*, 28 N. Y., 358.

⁷⁵ *Robinett's Appeal*, 37 Pa. St., 174.

CHAPTER XXIV.

MISCELLANEOUS POINTS RELATIVE TO CIVIL ISSUES.

Section 368. Bearings of Evidence.

- 369. Subsequently Discovered Evidence.
- 370. Defendant without Notice.
- 371. Identity of Issues.
- 372. Recital of Justice's Judgment.
- 373. Void Assignment.
- 374. Fraud.
- 375. Concealment of Cause of Action.
- 376. Mutuality as to Fraud.
- 377. Payment.
- 378. Interpretation of Contract.
- 379. Municipal Negligence.
- 380. Facts in Equity.
- 381. Penal Actions.
- 382. Bailor and Bailee.
- 383. Garnishment.
- 384. Usurious Contract in Mortgages.
- 385. Mechanic's Lien.
- 386. Administration—Seven Years Presumption of Death.
- 387. Mandamus.
- 388. Revision of Official Accounts.
- 389. Authority of Wife as Agent.
- 390. Diligence of Officer.
- 391. Attachment Bond.
- 392. Contempt.
- 393. Overflowing Lands.
- 394. Capacity of Mining Ditches.

Section 395. Warranty—Recoupment—References.

- 396. Exemption.**
- 397. Written Submission.**
- 398. Reasonable Time.**
- 399. Insolvency.**
- 400. Pauperism.**

It is not always easy, or indeed at all practicable, to give an accurate or definite classification of all important decisions pertaining to a general subject, and hence it is sometimes expedient to provide an *omnibus* chapter which will take in anything offered, indiscriminately, and hold all together, as in a reservoir, to be drawn out of as desired.

SECTION 368. We begin, here, with the matter of evidence in reference to issues actually presented in a primary adjudication. The Indiana court has decided that “if the testimony offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the one suit is no bar to a recovery in the other, although it is for the same cause of action for which he attempted to recover in the first suit”; because this indicates a difference in the question decided.¹ But a second action cannot be maintained on evidence once offered and rejected in the trial of a like action between the parties; for this would “throw all judgments into uncertainty and confusion.”² Neither party can be left free to prove the facts in issue in a previous action to be untrue. For “where the facts themselves are adjudicated and found, every reason exists that the principle of evidence is founded upon for concluding parties by the result of their previous litigation, and holding them debarred by such finding so far as those facts themselves may be brought into controversy in the second action, and may be essential to the right of recovery therein. As to such facts, the parties have had their day in court, with a definite decision rendered upon them.”³ And it is sufficient to constitute a

¹ *Kirkpatrick v. Stingley*, 2 Ind., 269; *R. R. v. Clark*, 21 Ind., 153.

² *Smith v. Whiting*, 11 Mass., 447.

³ *People v. Smith*, 51 Barb., 363.

bar that evidence was given or attempted;⁴ and sometimes that it might have been, as we have seen in a previous chapter.

And so, the broad rule is laid down, in New York, that "The question whether a verdict and judgment for the defendant in a former action is a bar to a second suit for the same cause or matter does not depend upon the fact that the proof in the former suit was sufficient to sustain that action. For where the same matter was in issue, and submitted to the jury in the former suit without sufficient proof, the decision of the jury upon the matter in issue and thus submitted to them, followed by the judgment of the court upon their verdict, will be a bar to another action for the same cause or matter, where the same evidence which is necessary to sustain the second suit if it had been given in the former action would have authorized a recovery therein. Where a general declaration embraces several causes of action, the plaintiff in a second suit may show that he offered no evidence as to one or more of those causes of action, and that the cause went to the jury upon a different part of his claim from that for which the second suit is brought. And then the judgment in the first action will be no bar to the second. But when he attempts to give evidence as to all the causes of action, and submits the question to the jury without withdrawing any part of his claim, and he fails as to the whole, or a part, for want of sufficient proof, the defendant may insist upon the first judgment as a bar, if the same evidence which is sufficient to sustain the second suit would have authorized a recovery in the first action in case it had been produced upon the trial thereof."⁵

SEC. 369. But a question arises in regard to subsequently discovered evidence. The general rule on this, is, undoubtedly, that in a proper case newly discovered evidence which is not merely cumulative is a proper basis for opening up a judgment and giving a new trial in the cause, but that even such evidence cannot usually be made available in a second

⁴ *Ehle v. Bingham*, 7 Barb., 494.

⁵ *Miller v. Maurice*, 6 Hill, 121.

suit embracing the issue concluded by the former judgment. As to merely cumulative evidence, the Pennsylvania court say: "It may be a great misfortune, as in this case, that from causes over which he had no control, the party may not have been properly prepared for trial. It is, however, a misfortune which this court cannot remedy, as the rule is settled on the principle that there must be an end of litigation."⁶

SEC. 370. A defendant who has had no notice, actual or constructive, of a first action to foreclose a mortgage, cannot appear and plead the decree therein to a second foreclosure suit as a bar, since, in such case, the first decree is a mere nullity.⁷ But it has been held in the same state where this was decided, that a *bona fide* holder of a promissory note by assignment without indorsement, who delivered it to a justice of the peace for collection, where it was thereon sued in the name of the payee, and the action resulted favorably to the maker, the holder having no actual knowledge of the time of trial, and the payee living in another state and having no knowledge of the suit, would be *prima facie* concluded by the judgment in a subsequent suit on the same note brought in his own name.⁸ Where a judgment recites service, sometimes, however, it may be shown that there was no service, and, therefore, no jurisdiction of the person.⁹ But, in California, the recital can only be attacked in a direct action to impeach the judgment,¹⁰ as well as in other states.

SEC. 371. The issue, as we have previously seen, must be the same in all material respects, or else there is no bar. And so, where suit was brought on a promissory note alleged to be lost, and described as payable on demand, with interest from date, and in defense a former judgment was pleaded on a note precisely similar to the one in suit, except that it was described as payable one day after date, and there was an accompanying allegation that the plaintiff intended in the former action to describe the identical note in suit in the second, and in the

⁶ *Kilheffer v. Herr*, 17 S. & R., 320. ⁹ *Clark v. Little*, 41 Iowa, 497.

⁷ *Woodhull v. Freeman*, 21 Ind., 229. ¹⁰ *Branson v. Caruthers*, 49 Cal., 374.

⁸ *Hackleman v. Harrison*, 50 Ind., 156.

former suit the defendant had pleaded under oath *non est factum*, it was held that as in the former suit the issue joined could not have been sustained by proof of a note payable on demand, the former judgment was no bar. The court said that "if, in the former action, the defense had been simply a failure of consideration, or payment, it would not be apparent, perhaps, on the face of the record, that the variance was material, as it would not appear that it would prejudice the defendant. But when, as in this case, the issue was *non est factum*, then the variance was material, for it proved the defendant's answer and defeated the action."¹¹

SEC. 372. In Vermont it has been held that the record of a justice of the peace reciting a judgment by confession is conclusive, so that a subsequent attaching creditor cannot be allowed to contradict it by showing that the defendant never appeared personally before the justice.¹²

SEC. 373. But a judgment against a debtor and his assignee declaring the assignment void is held in New York not to be evidence that it is void, in supplementary proceedings by another creditor against the same debtor, to which the assignee is not a party,¹³ because a reverse judgment could not, in such circumstances, be used to prove the validity of the assignment, and there is, therefore, not the requisite mutuality to make the record available.

SEC. 374. The question of fraud, in various forms, is very prominent in litigation. Thus the fraud of a bankruptcy certificate—and probably nine-tenths of them are procured by fraud, and steeped in it—is regarded as *res adjudicata*, if determined even in a *scire facias* proceeding on a judgment.¹⁴ Of course it requires clear proof, however, of fraud in a former adjudication to avoid its effect in a second suit.¹⁵ But we will have occasion to examine these matters more at large in the chapter below on Enjoining Judgments.

¹¹ *Pattison v. Jones*, 27 Ind., 460.

¹² *Farr v. Ladd*, 37 Vt., 158, and cases cited.

¹³ *Field v. Sands*, 8 Bosw., 686.

¹⁴ *Peterson v. Lathrop*, 34 Pa. St., 227.

¹⁵ *Hulverson v. Hutchinson*, 39 Iowa, 316.

SEC. 375. As to a fraudulent concealment of the cause of action, it may be usually availed of, probably. But it must be an active concealment, amounting to deception, for mere silence will not be a ground of complaint in an adversary, who is not under any obligation to assist his opponent to defeat himself. And so, even where an insurance policy was *obtained* by fraud, and the injured party was not cognizant of the fraud for three years afterward, and, meanwhile, the policy had been successfully sued on, the judgment on it was held conclusive. The court said: "The only plausible ground upon which the present case can be put for the plaintiff is, that the matter of fraud which is the *gravamen* in the present action, did not come in question in the trial upon the policy, but the rule will not admit of an exception like this; if it did the rule itself would be nugatory. It is sufficient that the action was of a nature to admit of such a defense, and that the plaintiff in the new suit might have availed himself of the same subject-matter in the former one. Where the failure is imputable to laches, there can be no question, and where it is the effect of ignorance of the facts, there must be a period within which the party suffering shall be held to present his claim, or great mischief may ensue."¹⁶

Where, however, there is a relation of confidence necessarily existing, as between a principal and agent, the mere silence of the latter in matters within the range of his duty may be a vitiating fraud allowing an after action. For example, an insurance company sued on the bond of their agent and recovered against him and his securities, and afterward brought *scire facias* to recover upon *further prior breaches* of the bond, in retaining money belonging to the company, which he had concealed from their knowledge, so that they knew nothing of it when the former judgment was rendered. The court sustained the proceeding, and gave, as the reason thereof, that "the bond was given to secure an *accounting*, as well as payment, and this was necessary for the obvious reason, that generally an insurance company has no means of discovering the

¹⁶ *Homer v. Fish*, 1 Pick., 440.

receipt of money until the agent informs his principal of the fact. An agent cannot be permitted to set up his own wrong to avoid a liability, and if he kept the company in ignorance of his receipts he cannot, on that ground, object that they have not acted as if they knew what they did not know. Our statute makes a fraudulent concealment of a cause of action a ground for excepting it from the statute of limitations, and if it avails for such a purpose it must equally avail in a case like the present. The *scire facias* avers that it is a new breach, and gives the fraudulent concealment as a sufficient reason for not including it in the original pleadings and judgment."¹⁷

In California concealment of the evidences of a credit, and especially where a plaintiff conspires with a defendant to defraud a co-defendant out of a proper credit by concealing it from his knowledge, the latter may be set up as a defense afterward in bar, with proof of the fraudulent concealment and conspiracy in the former action.¹⁸

SEC. 376. Strict mutuality is requisite in impeaching an alleged fraudulent conveyance to hinder or delay creditors, so that a former judgment against the grantor therein alone may be conclusive against him in the proceeding to set aside the conveyance, but not against the grantee joined with him in the latter action, who may allege and prove a want of indebtedness on the part of the grantor at the date of the deed.¹⁹

SEC. 377. Where one delivered goods to his creditor as collateral security for the debt, and being sued, defended on the ground that the creditor had sold the greater part of the goods, and thereon obtained judgment, this judgment was held to be a bar afterward to an action brought by him against the creditor to recover the goods; because he had, under the plea of payment, been allowed for the goods, and if he had not been allowed for all of them, or a sufficient amount, he could not split up his claim so as to make a part of it available in a second action.²⁰

SEC. 378. The interpretation of a contract, as well as the

¹⁷ *Johnson v. Ins. Co.*, 12 Mich., 223. ¹⁹ *Eddy v. Baldwin*, 23 Mo., 588.

¹⁸ *Spencer v. Vigneaux*, 20 Cal., 442. ²⁰ *Simes v. Zane*, 24 Pa. St., 242.

existence of a fact, becomes *res adjudicata* by being authoritatively determined; as, for example, if the right to take receipts on a railroad by virtue of a contract is the subject passed on, the decision concludes the question of the meaning of the contract in a suit for subsequent tolls received under it.²¹

SEC. 379. Where an action is brought against a city, in a state court, for an alleged neglect to discharge the legal duty of keeping its harbor free from obstructions, and results in a judgment that such legal duty does not exist, such judgment will be a bar in a court of admiralty, where the libel alleges that the city being bound to keep the harbor clear, entered upon its duty in this regard, but abandoned the work before completion, whereby an accident occurred, etc., provided the cause of action otherwise is the same.²²

SEC. 380. The decision of facts by a court of equity is held to be conclusive on the parties, even if the bill is finally dismissed on the ground that there is an adequate remedy at law, unless there be an entire want of jurisdiction in the court of equity.²³

SEC. 381. An action for a penalty allowed by statute for refusing to execute a decree by discharging a mortgage, and for special damages resulting from disobedience to the decree, may be maintained after a judgment for the mortgagor in an action to restrain the foreclosure and compel the discharge. Although the same facts are set up in the two cases, yet this is done for an entirely different purpose, and to establish an entire and distinct cause of action. The issues are different, the latter including the circumstance of disobedience to an authoritative decree, which the former does not.²⁴

SEC. 382. Where goods are delivered on the stipulation that no title shall pass until payment, it is held the parties do not sustain the relation merely of bailor and bailee. And, if

²¹ *Tioga R. R. v. Blossburg R. R.*, 21 Wall., 137.

²² *Goodrich v. City of Chicago*, 5 Wall., 566.

²³ *Munson v. Munson*, 30 Conn., 433.

²⁴ *Mallory v. Mariner*, 15 Wis., 178.

the vendee obtain a judgment against a trespasser, which is satisfied by payment, the judgment being for taking and converting the goods, it does not bar a second action by the vendor for the value thereof when his right to possession reverts by the non-payment of the price²⁵ — because the purchaser had no right except to the possession only, and on this his judgment must be based; while the seller held the absolute ownership until payment, and so could recover for damage to this. And so a judgment creditor of a vendee, who issues execution and seizes a chattel, and on being notified of the vendor's claim gives the officer a bond of indemnity, and the officer sells the property, is liable to the vendor for the value.²⁶

SEC. 383. Even payment of an execution issued on a judgment obtained in another state against a garnishee in foreign attachment, will not, in Massachusetts, bar an action previously commenced in a domestic court by the principal defendant against the garnishee, and in which the defendant had appeared, if the judgment in the other state had been obtained on his willful default; because, in such case, the payment thereof must be regarded as voluntary, if not collusive, and therefore as affording him no protection.²⁷

SEC. 384. In an action on a mortgage, the court, without a jury, decided that the mortgage was executed upon a usurious contract. A subsequent action was brought by the defendant in the first, and his privy in estate by subsequent grant, against the former plaintiff, to set aside the mortgage as a cloud on the title, and it was held therein that the former record was admissible in behalf of both plaintiffs as against the defendant to establish the usury conclusively.²⁸

SEC. 385. Certain houses and lots were sold on execution and purchased by the judgment creditors. Before the cause had been docketed, a mechanic's lien on the property was recorded, and after the sale it was foreclosed without making

²⁵ *Hasbrouck v. Lounsberry*, 26 N. Y., 509.

²⁶ *Herning v. Hapcock*, 15 N. Y., 411.

²⁷ *Whipple v. Robbins*, 97 Mass., 110.

²⁸ *Bissell v. Kellogg*, 60 Barb., 627.

the judgment creditor a party. Under the decree of foreclosure the property was again sold, the holder of the lien becoming the purchaser. Afterward, the original owner bought back the property from the judgment creditor. The lien holder brought an action to recover possession against the owner. It was held that the owner was not debarred by the judgment in the mechanic's lien proceedings from setting up the new title he had acquired from the purchaser under execution through the sheriff's deed; this purchaser not being himself concluded since he was not made a party to the lien suit, his grantee, though the original owner, acquired his immunity by the new conveyance.²⁹

SEC. 386. An administrator's petition for the sale of land to pay debts, setting forth the number and amount of the debts, and a decree of sale thereon, are held not to be conclusive as to such debts, in a subsequent suit by an administrator *de bonis non* to recover a surplus over and above the debts, even if the devisees were made parties in the proceedings to sell lands. The court says that the decree is simply an adjudication that it was necessary to sell, and conclusively establishes title in the purchaser, but does not settle the question of indebtedness; the creditors not being parties, so that there is no mutuality.³⁰ And so, an order that the report of a guardian as to sale of land be recorded, does not conclude parties in interest from investigating his conduct in making the sale, and questioning his accounts.³¹ But where a claim presented to commissioners of an insolvent estate is rejected, and the court of probate confirms the report of the commissioners, this is conclusive against the claim, except so far as the statute provides a remedy; and this must be strictly pursued.³²

Payment made to one appointed administrator of the estate of one who has not been heard from for seven years will not, it has been held, protect against liability to pay again to the absentee himself, should he prove to be living and return to

²⁹*Flandreau v. Downey*, 23 Cal., 357. ³¹*Holbrook v. Brooks*, 33 Conn., 347.

³⁰*Latta v. Russ*, 8 Jones, 114.

³²*Burlingame v. Brown*, 5 R. I., 410.

attend to his own financial interests³³ — a somewhat severe ruling in such case. It would seem that such an absentee, being legally presumed to be dead, should be held to take his losses resulting from the operation of that legal presumption as belonging to the "fortunes of war," or rather of life, and to be content therewith. Settling his estate for him seems to be hazardous business, under the above authority.

SEC. 387. Judgments obtained in United States courts may be enforced by *mandamus* issued by a state court, and in proceedings for a *mandamus* the validity of bonds and coupons, or any other basis of the judgments, cannot be questioned.³⁴

SEC. 388. The revision of official accounts rests on the same basis as ordinary civil suits. Thus, where an auditor obtained judgment against a sheriff and his sureties on a certified account, and afterward the auditor's successor made a motion in the same court against them for another judgment on a revised and enlarged account for the same year, it was held the first judgment was a bar.³⁵

SEC. 389. In Rhode Island the authority of a wife to bind her husband for necessaries, in a state of separation, is held to be revoked by her adultery, committed before or after her separation, and whether the creditor has knowledge of it or not. And a decree dismissing a bill brought by the husband for a divorce on the ground of adultery will not preclude him from setting up the defense of adultery committed prior to the divorce suit, against an action for necessaries furnished her — the parties in the two actions being necessarily different.³⁶ And on similar grounds, it is held that a judgment is not admissible to prove an indebtedness prior to its rendition against one claiming under a conveyance from a debtor alleged to be fraudulent, in a suit brought to set aside the conveyance by a creditor.³⁷

³³ *Jochumsen v. Savings Bank*, 3 Allen, 87.

³⁴ *State ex rel. v. Beloit*, 20 Wis., 85.

³⁵ *Hobson v. Commonw.*, 1 Duv., 172.

³⁶ *Gill v. Read*, 5 R. I., 343.

³⁷ *Troy v. Smith*, 33 Ala., 471, RICE, Ch. J., dissenting.

SEC. 390. Under a statute allowing a judgment creditor to have an issue framed to try the diligence of an officer in collecting money on execution, if judgment be given for the officer, the creditor cannot afterward allege a want of diligence in this regard as to the same transaction.³⁸

SEC. 391. A suit on an attachment bond is not barred nor promoted as to the wrongful suing out of the attachment because a judgment for the defendant in the attachment may be based merely on the fact that the attachment was not prosecuted to effect as the bond provides.³⁹

SEC. 392. When a proceeding by attachment for contempt is used as a means of private redress, and a judgment therein is satisfied, it will bar a subsequent action for trespass as to the same subject-matter; as, for example, where a marshal institutes such proceeding, as an officer of the court, to compel a clerk to pay over money improperly received from the marshal on charges of fees which had been disallowed.⁴⁰

SEC. 393. A judgment for the plaintiff, in an action for overflowing his lands by obstructing a stream, in which there is a general denial set up, and also a license from the plaintiff's grantor, is not conclusive, in a subsequent suit between the same parties for the removal of a dam, upon the question whether the former defendant and present plaintiff had the right to maintain the dam, unless the former record shows that such right was then in issue, and the jury finds, on parol proof offered, that it was not, although the dam was the obstruction complained of in the first action.⁴¹

SEC. 394. Where a former action was claimed to have settled the capacity of certain ditches in a mining district, in California, the court held that as it did not appear so, and as the question of capacity was not distinctly relevant and material, the question was not *res adjudicata*. The court say: "There is nothing in this case showing that the verdict turned

³⁸ *Chapman v. Smith*, 16 How. (U. S.), 132.

³⁹ *Sackett v. McCord*, 23 Ala., 854.

⁴⁰ *Pitman's Case*, 1 Curtis C. C., 186; *Walker v. Fuller*, 29 Ark., 469.

⁴¹ *Newell v. Carpenter*, 118 Mass., 416.

upon the question of the capacity of the plaintiff's ditches, and it is a reasonable inference from the evidence that the issue upon that point was entirely disregarded. It was not necessarily considered, and as the verdict is general, its effect is limited to such issues as necessarily controlled the action of the jury. Upon the question of the capacity of these ditches, the jury could have found for the plaintiffs, and still justly and properly concluded that they were not entitled to damages. To hold that upon such a question the verdict is conclusive of the rights of the parties would, we think, be a plain perversion of the law."⁴²

SEC. 395. Where an action is brought, for the price of goods on which there is a warranty, a breach of the warranty, though not a complete defense to the action, may be assigned by way of recoupment to lessen the amount of recovery. And where, in such an action, a guaranty was set up, and the quality of the goods alleged to be not according to the contract, but the court instructed the jury after issue joined and evidence heard that "if the plaintiffs, on the day the contract matured, presented their account, and offered to deliver the goods, they fulfilled the contract on their part, and if the defendant did not, within a reasonable time and within the custom of the trade, make their objection to the article sold, and offer to rescind the contract, they are bound by it, and plaintiffs should recover;" and, accordingly, the plaintiffs recovered judgment for the price; it was held, that the instruction withdrew from the jury the consideration of a breach of the warranty, and directed them to decide the rights of the parties on other considerations, and hence the finding did not debar a subsequent suit on the breach of warranty for the difference in value between the goods contracted for and those delivered;⁴³ and it is not sufficient that the pleadings in the primary action raise the point in dispute; it must be adjudged in the case, and enter into the verdict. And so, if a verdict is rendered, and a motion for a new trial is interposed, and the

⁴² *Kidd v. Laird*, 15 Cal., 182.

⁴³ *Earl v. Bull*, 15 Cal., 421.

cause is continued, and finally dismissed without disposing of the motion, and without any judgment on the verdict, there is no bar to another action, for want of the judgment.⁴⁴

But in New York it is held that even matters not adjudged are *res adjudicata*, if within the meaning of the submission, either in an award or a judgment.⁴⁵ And so, in Missouri, if the non-determination is the result of laches, it will be held conclusive against the negligent party, on judgment against him.⁴⁶

In Massachusetts, where all demands are submitted to a referee, and he reports on all the demands submitted, it is competent for a party to show that a certain demand was not in dispute, and was, therefore, not included, and to maintain thereby an action on such demand.⁴⁷

SEC. 396. Where property is ordered to be sold under garnishee process, this order is not conclusive that the property was not exempt from execution, even if, in the attachment suit itself, the exemption was not claimed.⁴⁸

SEC. 397. Where there is a written submission to a referee, parol evidence will not be admitted as to what actually was decided. The writing cannot be varied by parol.⁴⁹

SEC. 398. Probably no judgment as to *reasonable time* can ever become *res adjudicata* on account of the indefiniteness of the expression, and the fact that the matter must usually be determined by the special circumstances of each particular case as it arises.⁵⁰

SEC. 399. In matters of insolvency it is held that a decree affirming the validity of proceedings therein, on a petition of the debtor to set them aside, concludes any subsequent application of a creditor to set them aside on the same and other grounds, even if the applying creditor had no notice of the

⁴⁴ *Rudolph v. Insurance Co.*, 71 Ill., 190.

⁴⁵ *Lowenstein v. McIntosh*, 37 Barb., 257.

⁴⁶ *Hotel, etc., v. Parker*, 58 Mo., 327.

⁴⁷ *Webster v. Lee*, 5 Mass., 334.

⁴⁸ *Wilson v. Stripe*, 4 Greene (Iowa), 552.

⁴⁹ *Buck v. Spofford*, 35 Me., 532.

⁵⁰ *Sage v. McAlpin*, 11 Cush., 165.

previous petition;⁵¹ whether a like rule would prevail during the reign of the bankrupt law, which overrides all insolvent laws of the states, I do not know. The rule rests on the ground that the *status* of the person of the debtor has been defined by the proceedings.

SEC. 400. In Pennsylvania, the rule as to paupers is, that an order of removal confirmed, is conclusive against all the world; an order discharged, as between the litigants; and an order quashed, is of no effect whatever.⁵²

In Vermont, an adjudication between two towns, fixing the settlement of a pauper, is conclusive on that question, even as to the pauper's bastard son, so far as facts prior to the adjudication extend.⁵³

In Massachusetts, where an action was brought against a town by the State Lunatic Hospital to recover the expense of supporting a lunatic pauper, a former judgment that the pauper had no settlement in the state, was held conclusive against the plaintiff as to the fact of settlement, and, consequently, the liability of the defendant.⁵⁴

⁵¹ *Merriam v. Lowell*, 8 Gray, 316.

⁵² *West Buffalo v. Walker Tp.*, 8 Pa. St., 177.

⁵³ *Cabot v. Washington*, 41 Vt., 168.

⁵⁴ *Jennison v. West Springfield*, 13 Gray, 544.

CHAPTER XXV.

HOW RES ADJUDICATA ARE AVAILED OF.

Section 401. Pleading and Evidence.

402. Pennsylvania Construction.

403. Res Adjudicata and Estoppel.

404. Senator Seward's views on Pleading and Evidence herein.

405. The Maine Court thereon.

406. Massachusetts Doctrine and New York.

SECTION 401. Formerly, it was maintained that the only way to derive full advantage from a prior judgment was to plead it, since, otherwise, it would not be conclusive evidence; for, as evidence, it would have to go to the jury to be weighed as other evidence. Then, a modification was introduced, that if a party has no opportunity to plead it, he might give it in evidence under the general issue. Finally, the rule, as deducible from the authorities, is that it is equally available as a plea, or as evidence; and this is undoubtedly the rule laid down in the *Duchess of Kingston's Case*.

Sec. 402. The Pennsylvania court say: "The propriety of those decisions which have admitted a judgment in a former suit to be given in evidence to the jury on the trial of a second suit, for the same cause, between the same parties, or those claiming under them, but at the same time have held that the jury were not absolutely bound by each judgment because it was not pleaded, may well be questioned. The maxim *nemo debet bis vexari so constet curiae quod sit pro una et eadam causa* being considered, as doubtless it was, established for the protection and benefit of the party, that he may therefore

waive it; and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then, it ought to be recollected that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed, at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence, it would seem to follow that wherever on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause between the same parties or those claiming under them is properly given in evidence to the jury, it ought to be considered conclusively binding on both court and jury, and to preclude all further inquiry in the cause; otherwise, the rule or maxim *expedit reipublicæ ut sit finis litium*, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded.”¹

SEC. 403. In a former case, HUSTON, J., in a separate opinion, gave vent to some caustic remarks at the expense of a celebrated jurist of England: “The question how far, and in what cases, a trial and judgment in a court of competent jurisdiction is conclusive of the same matter, coming, directly or incidentally, before another court, and not by appeal or writ of error, is one of general consequence. The law seems not to be disputed, but under what circumstances it will avail a party has become a question. In England, before the year 1776, and long after in New York, Massachusetts, Virginia, Pennsylvania, and in the Supreme Court of the United States, it is held to be equally available, whether pleaded in bar or given in evidence, when the rules of law permit it, under the general issue, as in assumpsit, and in ejectment; but, in some late elementary writers (1828) we find it laid down, on the authority of a distinguished English Judge (who has introduced more changes into Westminster Hall than any other ancient or modern Judge), that it is only available when pleaded as an estoppel. On full consideration, I incline to

¹ *Marsh v. Pier*, 4 Rawle, 288.

the opinion that this latter change is not an improvement, but an error. It seems to be supported, first, by the cases which say that a jury is not bound by an estoppel, and second, which say that a court of equity is not. An estoppel is always something personal—the party is estopped from recovering his claim, or proving his defense, by some act, in law, or in deed, or in *pais*, which precludes him from going beyond it, and proving all the case. It always arises from the act of the party estopped by it, but if the opponent, instead of relying on this act, will go beyond it, and put the cause at issue on other and especially anterior facts, the estoppel, being waived by him who had a right to avail himself of it, ceases to operate. * * * * *

"But a former trial, verdict and judgment is not the act of the party, but of the tribunal which decided; and to call it an estoppel is a misapplication of terms;* it has not the distinguishing mark of an estoppel; it is not the consequence of some act of the party bound by it; it is a bar to future recovery in any court on the same point between the same parties or privies, until reversed on appeal or writ of error; and, it is as much a bar in chancery, where an attempt is made to re-examine a matter once decided at law, as it is in a court of law; it is as much a bar in actions where we cannot plead specially, as ejectment, as in any other action, and as much a bar in an inferior tribunal, where there are no pleadings, as in one where the pleadings are or may be drawn out at length. Such are my impressions on this point; believing that the courts in this [state] and the other states, and the Supreme Court of the United States, have put the matter on its true ground, viz: that the order and peace of society, the structure of our judiciary system, and the principles of our government are the true grounds why such a judgment is conclusive, I am not willing to leave this ground and rest it on the narrow and inapplicable one of estoppel."²

* I had never seen this opinion when I wrote the first chapter herein, and I am, of course, gratified to see myself supported in my remonstrance as above, as I thought I was probably alone in my views.

²*Kilheffer v. Herr*, 17 S. & R., 324.

SEC. 404. Senator Seward spoke thus, in a cause in the Court of Errors, in New York, in 1831, in regard to this matter: "What would have been the legal effect of the former judgment, had the record thereof been received in evidence on the trial with such proof *aliunde* as would have identified the question involved in the former issue with that which was tried in this cause? Would it have been a *conclusive* or merely a *prima facie* answer to the plaintiff's action? The Supreme Court held, when this cause was first before them (3 Wendell, 40, the record having on the first trial been received in evidence), and reaffirmed when the cause came again before them, that the former judgment given in evidence under the general issue was not conclusive of the facts determined thereby. I cannot subscribe to this decision. In regard to this, as to almost all other questions not definitively settled, there is a *general rule*, a fundamental principle of law, and the conflicting adjudication in relation to it has grown out of the endeavor to apply such general rule to particular cases. The general rule in relation to the subject before us is thus stated by Lord HARDWICKE: 'It is an established rule of law that a fact which has once been directly decided shall not be again disputed between the same parties.' *Hugh Smithson's Case*, cited in Buller's N. P., 228. '*Nemo debet bis vexari*, is the general rule,' said Chief Justice WILMOT. *Kitchen v. Campbell*, 3 Wils., 308. The same general rule is laid down in our elementary books, and is universally admitted. 1 Phil. Ev., 242; 3 Norris' Peake, 163. Lord Chief Justice DE GREY, in *The Duchess of Kingston's Case*, 20 State Trials, 538, delivered, as the unanimous opinion of the judges, the following answers to questions proposed by the House of Lords: 'The judgment of a court of concurrent jurisdiction, directly on the point, is, as a plea, a bar; and as evidence, conclusive between the same parties, upon the same matter, directly in question in another court, but a judgment is no evidence of a matter which comes collaterally in question merely, whether the court be of concurrent or exclusive jurisdiction.' This

decision may be regarded as an attempt by the judges to furnish a rule for the practical application of the general rule *nemo debet bis vexari*. And if the judges were correct, it must be admitted that the application of the general rule, in most cases, would not be difficult. Unfortunately, however, it had long before, and has frequently since that decision, been held that a former judgment directly on the point in question *as evidence* is not conclusive between the same parties upon the same matter directly in question in a subsequent suit; and that a judgment so given in evidence is not conclusive, the Supreme Court, in delivering their opinion in this case, justly say may now be considered as the settled law in England, so that the decision of the judges in *The Duchess of Kingston's Case* should have been that a judgment of a court of concurrent jurisdiction, directly on the point is, as a plea, a bar, and as evidence, *prima facie* between the same parties, etc. Thus it will be seen that the general rule of Lord HARDWICKE is so far modified that it is only when the judgment is pleaded that it is conclusive. I have looked with much care through the cases cited by the counsel, as well as those cited by the court, to ascertain the grounds of the modification I have mentioned. The case of *Trevivan v. Lawrence*, 1 Salk., 276, occurred in the time of Queen Anne. Thus early the distinction as to the effect of a judgment when pleaded and when given in evidence was asserted. It was held that if the party will not rely upon the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact which is against him. In the case of *Outram v. Morewood* (3 East, 364), Lord ELLENBOROUGH, in commenting upon the case of *Evelyn v. Haynes*, says that a former recovery is not conclusive in a second action if given in evidence merely under the general issue, and in order to be an estoppel it must be pleaded as such with appropriate averments. In the case of *Vooght v. Winch*, 2 Barn. & Ald., 668, ABBOTT, Chief Justice, says: 'Upon the second point, I am of opinion that the verdict and judgment

obtained for the defendant in the former action was not conclusive evidence against the plaintiff upon the plea of not guilty. It would, indeed, have been conclusive if pleaded in bar, by way of estoppel. In that case the plaintiff would not be allowed to discuss the case with the defendant, and for the second time to disturb and vex him by the agitation of the same question. But the defendant has pleaded not guilty, and has thereby elected to submit his case to a jury. Now, if the former verdict was proper to be received in evidence by the learned judge, its effects must be left to the jury. If it were conclusive, indeed, the learned judge ought to have immediately nonsuited the plaintiff or told the jury that they were bound in point of law to find a verdict for the defendant. It appears to me, however, that the party, by not pleading the former judgment in bar, consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence, and they are to give their verdict upon the whole evidence then submitted to the jury.' BAILEY, Justice, coincided with the Chief Justice, concurring, as did the whole court, in the reasons assigned for the judgment. I have thus quoted at some length from two of the leading cases on the present question for the purpose of ascertaining what are the grounds of the modification of the general rule, so far as it applies to the effect of a former recovery when given in evidence under the general issue, and it must be seen that the only reason assigned is that the party, by not pleading the former judgment as an estoppel but leaving it at large upon the pleadings, waives it; or, as Chief Justice ABBOTT says, *he consents* that the jury shall reinvestigate the facts, and find with or against the former verdict, as they shall deem proper. The distinction is a sound one, and the reasoning is satisfactory because the general rule *nemo debet bis vexari* is still preserved; the party to be affected may insist upon its protection by pleading, or he may waive it by leaving the matter at large upon the pleadings. If he will waive when he might insist upon it, he cannot afterward assert it.

But we come now to a new class of cases. In the action of ejectment, the plea must be the general issue. The defendant must join in the consent rule, and by that consent rule he is required to plead the general issue only; I speak of the action of ejectment, as it was previous to the passing of the revised statutes. Now, indeed, it is enacted that the defendant shall plead the general issue only, in ejectment. In the action of ejectment, therefore, the defendant cannot plead that the plaintiff ought to be precluded from his action because a former judgment had passed against the plaintiff upon the validity of his pretended title. Here, then, is a case in which the defendant certainly cannot be said to waive the estoppel, or to neglect to plead it, or to consent that the jury shall pass upon the question—he must plead the general issue only; and under that issue the judgment must be conclusive, or else he has not the protection of the general rule. Thus, it will be seen, that in such a case if the former judgment when given in evidence under the general rule is not conclusive, the defendant's rights are sacrificed by an exception to a general rule, although, in his case, the reason of the exception altogether fails. This difficulty was stated and surmounted by Judge MARCY, in delivering the opinion of the Supreme Court in this cause, when it was first before that court, in the following manner: ‘It is to be observed,’ he says, ‘that in these cases [the case of *Vooght v. Winch*, and others above cited] the defendants might have pleaded what they offered as evidence, but in the present case the usual course of pleading did not allow the defendant to present by a plea what he offered in evidence as conclusive, but it does not seem very reasonable that this circumstance should vary the effect of the evidence when offered under the general issue.’ Now, with all deference, I think that the learned judge, in declaring that it does not seem very reasonable that this circumstance should vary the effect of the evidence, begs the whole question, and, I confess, to me it seems much more reasonable that the effect of the evidence should be varied by the inability to

plead the former recovery than that the jury in a second action should be allowed to pass upon the same question once tried between the same parties, although the defendant could not plead the former judgment as an estoppel.”³

Sec. 405. The above argument is based on the principle that the former judgment should be allowed to be given in evidence conclusively, where there is no opportunity to plead it. Otherwise, not. But, in a comparatively recent case, the Maine court goes much farther, and without directly deciding, yet strongly intimates that the matter should not at all be left dependent upon the option of litigants, or the accuracy of pleaders. The court say: “The plaintiff objects, first, that if this estoppel existed, and was to be relied on by defendant, it should have been specially pleaded in bar; and not being so pleaded, it is not conclusive. In his specifications of defense, filed in this suit according to the statute, the defendant did set out the judgment in favor of H. Randall, averring that it was recovered against the plaintiff as an original promisor upon the note; and he presents it in a brief statement of special matter of defense, claiming that plaintiff is thereby estopped from maintaining this action, and from putting in testimony in this suit to show that he was not an original promisor upon the same. Whatever different opinions may be entertained of the wisdom of the legislation which allows the general issue to be pleaded in all cases with a brief statement of special matters relied on in defense, it was no part of the object of the legislature to set a trap for the feet of the unwary. An election of this sort being given, the brief statement, when made with sufficient precision, becomes, to all intents and purposes, a substitute for the special plea, the place of which it is allowed to supply. The statement of the points therein made is equivalent to the filing of so many special pleas, and gives to the party filing it substantially the same rights. The difference is of form merely, and not at all of effect. If the estoppel attaches, the objection to the form

³ *Wood v. Jackson*, 8 Wend., 37.

of pleading it cannot avail. To dispose of this point it is not necessary for us to decide whether or not the weight of reason or authority would not require us to hold that where a former recovery is simply given in evidence, it is equally conclusive in effect as if it were specially pleaded by way of estoppel. When that question necessarily arises, the arguments urged by KENNEDY, J., in *Marsh v. Pier*, 4 Rawle, 288, and other similar considerations which easily suggest themselves, will deserve careful consideration before we hold that the conclusiveness of judgments, and the consequent peace of the community, and the convenience of fresh litigants shall depend upon the option of persons litigiously disposed, or upon the accuracy of pleaders."⁴

The same court, in a previous case, expressly decided that where the former judgment could not be pleaded, it might be given in evidence as effectually.⁵

SEC. 406. The doctrine, in Massachusetts, seems to be that the judgment is as conclusive in evidence as if pleaded in bar, except that if the pleadings actually do present the point, the former judgment must be pleaded, and if it is not so, it is only admissible and not conclusive evidence to go to the jury on the fact in issue. The rule is thus stated by the court: "When the matter to which the estoppel applies is distinctly averred or denied by one party, and the other, instead of pleading the estoppel as he may in that case, takes issue on the fact, he waives the estoppel, and the jury are at liberty to find the truth."⁶ The implication is that the matter needs not to be pleaded, unless issue is actually joined on the fact embraced in the former adjudication, and if such issue is not joined, and the former judgment therefore is not pleaded, it is as conclusive when offered in evidence. And where the fact incidentally arises on a trial, the former judgment is conclusive thereon. And this is also a legitimate inference from all the authorities which declare that the form or object of the second action

⁴ *Sturtevant v. Randall*, 53 Me., 150.

⁵ *Chase v. Walker*, 26 Me., 559.

⁶ *Howard v. Mitchell*, 14 Mass., 243; *Adams v. Barnes*, 17 Mass., 368.

needs not to be the same as in the first, although the issue itself, whether a direct or incidental issue, must be the same as the direct and essential issue in the first. And this comprehends almost the whole current of authority, so that the rule is well established that a former judgment may be made as available in the way of evidence as by pleading it.

And notwithstanding the bewilderment of the Supreme Court of New York, above criticised by Senator Seward, the former doctrine, as well as the later, is certainly correspondent. And as early as 1824 the same Supreme Court said, in an action of *assumpsit*: "It is, in general, true, that under *non-assumpsit* most matters in discharge of the action which show that at the time of the commencement of the suit the plaintiff had no cause of action may be taken advantage of. This rule may appear somewhat arbitrary, as the object of pleading is to apprise the adverse party of the grounds of defense. It is, however, peculiar to this action, although, as Chitty observes, not according with the logical precision which usually prevails in pleadings. The judge ought to have charged the jury that if from the evidence they were satisfied that the matters in question had been passed upon in the Marine Court, the record was conclusive against the plaintiff's right to recover."⁷

⁷ *Gardner v. Buckbee*, 3 Cowen, 127; *Burt v. Sternburgh*, 4 Cowen, 562; see also *Young v. Black*, 7 Cranch (U. S.), 567.

CHAPTER XXVI.

CRIMINAL ACTIONS.

Section 407. Criminal Actions *Sui Generis*.

- 408. Twice in Jeopardy.
- 409. Construction of United States Constitution — Jeopardy defined.
- 410 Verdict of Acquittal
- 411. *Nolle Prosequi*.
- 412. Variance.
- 413. Discharge of Jury — Exhaustion, etc.
- 414. Issues in Criminal Actions — Identity.
- 415. Plea of Identity.
- 416. Concurrent Jurisdictions — Two-fold Punishments.
- 417. Different Sovereignties.
- 418. Divisible Offenses.
- 419. Want of Jurisdiction.
- 420. Prosecutions and Civil Suits.
- 421. *Habeas Corpus*.

SECTION 407. We have passed over the ground relating to parties and issues, in personal actions of a civil nature, and come now to the application of the same principles to public prosecutions. These are *sui generis*, especially in one particular, as to the bearings of this subject, namely, a want of mutuality which is regarded as an essential ingredient in the doctrine of *res adjudicata* as to civil personal actions. For, while an accused person can set up a former acquittal or conviction, the other party, the public, can never make such prior adjudications in any way available.

SEC. 408. The principle— which is parallel to the principle

prevalent as the fundamental rule in civil cases—is, that no one shall be twice put in jeopardy for the same offense. And, accordingly, the primary inquiry under it is, when does jeopardy attach, so as to be a bar to any subsequent prosecution? The boundary line generally observed seems to be the point where the case is given to the jury for decision; and this, also, is subject to a prominent exception, namely, if the jury are unable to agree on a verdict, there may be another trial. Also, after conviction there may be a new trial at the instance of the prisoner, but not otherwise, in most states. We will proceed to explain these matters in the light of the authorities.

SEC. 409. In a voluminous piratical case,¹ STORY, J., thus defined the constitutional clause: "Now the question is, what is the true interpretation and meaning of this latter clause? When, in a constitutional sense, can a person be said to be twice put in jeopardy of life or limb? If resort should be had to the grammatical structure and meaning of the words, the natural interpretation would certainly seem to be that no person should be twice put upon trial for any offense for which he would be liable upon conviction to be punished with the loss of life or limb; for jeopardy means hazard, danger, peril; and when a party is put upon trial for an offense punishable with the loss of life or limb, and he stands for his deliverance upon the verdict of the jury, he is thereby put in jeopardy, hazard, danger, or peril of his life or limb." As a general outline definition, this may be accepted. But from this the learned judge drew, though not without dissent from his associate, what I must, with all due deference to his eminent reputation as a jurist, regard as a most unwarrantable and illogical conclusion, that the constitutional provision instead of merely operating as a protection to a prisoner, actually took away from the courts the power of granting a new trial, even on the application of one convicted of a capital crime, because such a new trial would be a second jeopardy! In this the case has certainly never passed into general precedent, even if it has ever

* *U. S. v. Gilbert*, 2 Sumner, 38.

been followed at all, anywhere; and it even has a whimsical look, to me at least.

The general rule is much more accurately stated by the Indiana court, in these terms: "When a valid indictment has been returned, by a competent grand jury, to a court having jurisdiction, the defendant has been arraigned and pleaded, a jury been impaneled, sworn, and charged with the case, and all the preliminary things of record are ready for the trial, the jeopardy contemplated by the constitution has then attached, and the defendant is entitled to a verdict. The defendant may by his consent, or various acts from which such consent will be presumed, waive this constitutional right. Or, unforeseen occurrences may intervene, which will operate to withdraw from the prisoner the benefit of this privilege. But when the indictment is valid, and the proceedings are regular, before a tribunal having jurisdiction down to the time the jeopardy attaches, there can be no second jeopardy allowed, in favor of the state, on account of any lapse, or error, at a later stage."²

The Louisiana court say: "It is a principle of the common law that no man is to be brought into jeopardy more than once for the same offense, hence, a former conviction or acquittal will bar a subsequent prosecution. But the conviction or acquittal must be a legal one, upon trial by verdict of a petit jury. There must be a legal acquittal or conviction by verdict, *i. e.*, the verdict must be a valid one, not subject to be set aside. If the court awards a new trial upon quashing the verdict, whether at the instance of the prisoner, or in special cases, on the application of the prosecution, it is evident that in the eye of the law the accused has not been in jeopardy. The contrary opinion is illogical, and were it to prevail would entirely do away with new trials. The verdict must be such a one as the court may act upon, and the conviction susceptible of being followed by sentence."³

But this is inaccurate in one particular, namely, it requires

² *Morgan v. State*, 13 Ind., 216.

³ *State v. Walters*, 16 La. An., 401.

in all cases an actual verdict. But we will see that a prisoner may be discharged under certain circumstances, where there has been no verdict following a trial, and be exempted from another prosecution. GIBSON, J., delivering the opinion of the Pennsylvania court, says: "Nor do I understand how a prisoner shall have been said not to have been in jeopardy before the jury have returned a verdict of acquittal. In the legal, as well as the popular sense, he is in jeopardy the instant he is called to stand on his defense, for, from that instant, every movement of the commonwealth is an attack on his life [in a capital case], and it is to serve him in the hour of his utmost need that the law humanely adds to the joinder of the issue a prayer for safe deliverance. The argument must, therefore, be that he is not put out of jeopardy unless by a verdict of acquittal, and that to try him a second time, having remained in jeopardy all along, is not to put him in jeopardy twice. In this aspect, it must be obvious that the argument is an assumption of the whole ground in dispute. If the prisoner has been illegally deprived of the means of deliverance from jeopardy, every dictate of justice requires that he be placed on ground as favorable as he could possibly have attained by the most fortunate determination of the chances."⁴

The Maine court say: "One cannot be considered as put in jeopardy where a trial was had before a court not having jurisdiction, where the indictment was insufficient so that no judgment could be rendered thereon, nor where a trial has been broken off by some accident, so that there was no verdict, where the jury being unable to agree were discharged, and where the prosecuting officer has entered a *nolle prosequi*.* But where a jury has been impaneled, and have rendered a verdict of acquittal, and judgment has been entered thereon, though there has been no evidence adduced against the accused, he cannot again be put upon trial for the same offense."⁵ In Missouri, it seems to have been held that the principle of

**Commonw. v. Clue*, 3 Rawle, 501.

⁵ *Stevens v. Fassett*, 27 Me., 282.

*This, also, is under restriction, as we shall see below.

not jeopardizing a prisoner twice is restrained to offenses punishable by loss of life or liberty, and the court intimates that in criminal cases an appeal will lie by the state as well as on behalf of a prisoner,⁶ which cannot now be the law usually anywhere. And the contrary is expressly determined, in a late case in that state, as to major offenses at least.⁷

In Tennessee it has been held that a verdict of acquittal is a bar to further prosecution, although judgment is not given thereon. And the court very forcibly says that "the prisoner ought not to be again tried, though judgment be not pronounced, if there be a verdict of not guilty upon a sufficient indictment; otherwise he might again be indicted and tried, though he had the verdict of not guilty in his hand, merely because the court might not think proper to pronounce judgment upon it, and, notwithstanding this clause in our bill of rights, in factious times a man for want of a judgment which the court would not pronounce might be tried again and again, until a jury were found who would convict him."⁸

SEC. 410. Where there is a verdict of acquittal, no previous irregularity will save to the state the right of a subsequent prosecution for the same offense. The Supreme court of Indiana say on this point: "Although the state may have been improperly refused by the court leave to enter a *nolle prosequi*, or the court have misdirected the jury, or illegal evidence may have been admitted, or legal testimony rejected, or the verdict be against evidence, the verdict and judgment of acquittal on an indictment, if fairly obtained, are conclusive."⁹

SEC. 411. As to the right of the state to enter a *nolle prosequi*, so as to save the cause of action for another prosecution, it must be entered at a proper stage of the proceedings, or it will be lost. The Massachusetts court say, in an early case: "There are some stages of a trial in which the right to enter a *nolle prosequi* clearly ceases, as, after a verdict of manslaughter on an indictment for murder; in others, a question

⁶ *State v. Spear*, 6 Mo., 645.

⁷ *State v. Palmer*, 30 Mo., 385.

⁸ *State v. Norvell*, 2 Yerg., 25.

⁹ *State v. Davis*, 4 Blackf., 346.

might be made, as after the evidence is closed, or after it has been summed up to the jury. In some cases it should seem the cause must be taken from the jury of necessity, as if the jury cannot agree, or if one of them is taken ill so that he cannot proceed in the trial. Suppose the principal witness suddenly absconds, or is seized with a fit after the jury are impaneled, and so is unable to testify, it seems proper that in such cases the court should have power, at their discretion, to stop the trial. Where the indictment is defective the prisoner is not put in jeopardy, and a verdict would be nugatory. We do not, however, now decide what the court would do in any supposed case of necessity, but confine ourselves to this particular case, and to this stage of it. The prisoner is put upon his trial on an indictment for arson. A material part of the facts in issue is whether the barn was the building of Gay and Newell, as alleged in the indictment, and the evidence produced by the government will not warrant the jury in finding that it was their building. It is a case where there is no necessity, no unforeseen cause of delay, no accident, no mistake, no extraordinary exigence. It is an ordinary case of a good indictment in point of form, but a failure in the proof. And we think, therefore, that the prisoner is entitled to a verdict of acquittal.”¹⁰ In Alabama, it is held that a *nolle* cannot be entered after the case is submitted to the jury, unless the prisoner consents to it. And if, without such consent, a *nolle* is entered, it will discharge the accused.¹¹ In Texas, it may be done at any time before verdict.¹² In Tennessee, under late decisions, a *nolle* must be entered before the organization of the jury, in capital cases, though the court say less strictness is requisite in other cases.¹³ In Ohio, a *nolle* cannot be entered after the jury are impaneled and the witness sworn, and if the prosecutor does so because the evidence is not sufficient, it amounts to an acquittal.¹⁴ So, in Iowa, a case cannot be withdrawn from the jury, and the accused again held to trial,

¹⁰ *Commonw. v. Wade*, 17 Pick., 399.

¹³ *State v. Connor*, 5 Cold., 317.

¹¹ *Grogan v. State*, 45 Ala., 9.

¹⁴ *Mount v. State*, 14 Ohio, 295.

¹² *Swindel v. State*, 32 Tex., 102.

even if newly presented, and if this is done because the name of the government witness is not indorsed on the indictment, it works an acquittal.¹⁴ In Maine, the plea of *antrefois convict* is good if, after a verdict on the former trial against the prisoner, the indictment was dismissed, and the defendant discharged without day.¹⁵ In Kentucky, a *nolle* may be entered before the case is submitted to the jury.¹⁶

I think the general rule is that a *nolle* may be entered so as to save the case at any time before the cause is submitted to the jury for consideration, but not afterward.

SEC. 412. Sometimes, as in New York, it is provided by statute that an acquittal because of a variance between the indictment and the proof will not be a bar to another prosecution.¹⁷ In the absence of a statute, however, the usual rule governing civil cases will apply, that the case cannot be tried again. And it is doubtful whether such a statute is consistent with the constitutional principle we are considering; for it seems simply to say that if the prosecution fails in relevant proofs, the State may try again.

SEC. 413. Incidentally, we have already noticed that the failure of a jury to agree will not work an acquittal, or bar another trial.¹⁸ But if a jury be discharged without a strict legal necessity, and without the consent of the defendant, it is equivalent to an acquittal.¹⁹ Sometimes, the *strict legal necessity* may be the sickness of a material witness.²⁰ But the discharge, even then, must be in the presence of the prisoner; as, for example, where one was arraigned on an indictment for murder, and the case was given to the jury, which reported an inability to agree, and the court discharged them, without bringing the prisoner into the court-room from the jail, it was held a bar to

¹⁴ *State v. Callendine*, 8 Iowa, 288.

¹⁵ *State v. Elden*, 41 Me., 165.

¹⁶ *Wilson v. Commonw.*, 3 Bush, 105.

¹⁷ *Canter v. People*, 38 How. Pr., 93.

¹⁸ *Lester v. State*, 33 Ga., 329; *State v. Walker*, 26 Ind., 346; *Dobbins v. State*, 14 Ohio St., 493; *McCreaty v. Commonw.*, 29 Pa. St., 323; *U. S. v. Perez*, 9 Wheat. (U. S.), 579.

¹⁹ *Clements' case*, 50 Ala., 459.

²⁰ *Steck v. State*, 28 Ark., 113.

further prosecution.²¹ And a legal necessity can only arise from some circumstance beyond the control of the court, such as death, sickness, or insanity of a witness, juror, the prisoner, or the court.²²

In Kentucky, however, it seems to be the doctrine that no discharge of a jury — nothing short of a verdict actually rendered — will bar a subsequent prosecution.²³ If so, this is undoubtedly anomalous.

Temporary exhaustion from want of food is not a legal necessity justifying a discharge, when the rule is such as prevails of late in our country, that a jury may have suitable refreshments under the order of court; and so where two jurors were thus incapacitated by privation, notwithstanding the prisoner expressly agreed that they should have necessaries, and the panel was discharged, it was held to acquit the prisoner.²⁴ If the ancient regime prevails of screwing up an agreement by the torture of hunger, the result will doubtless be different. For, in such a view, a Pennsylvania judge declared that “a case may arise in which a jury may find great difficulty in agreeing, and some of them may be so exhausted as to put their health in danger. No one can think, for a moment, that they are to be starved to death. God forbid that so absurd and inhuman a principle should be contended for! Very far from it. The moment it is made to appear to the court, by satisfactory evidence, that the health of a single jurymen is so affected as to incapacitate him to do his duty, a case of necessity has arisen which authorizes the court to discharge the jury.”²⁵ In a later case, the court say: “It is scarcely to be doubted that the original object of keeping a jury together, without meat, drink, fire, or candle, was to extort the concurrence of those who would otherwise have withheld it; for, though Sir MATTHEW HALE, in his Pleas of the Crown, 297, declares that ‘men are not to

²¹ *State v. Wilson*, 50 Ind., 487.

²² *People v. Webb*, 38 Cal., 480.

²³ *O'Brian v. Commonwealth*, 6 Bush, 563.

²⁴ *Commonw. v. Clue*, 3 Rawle, 500.

²⁵ *Commonw. v. Cook*, 6 Searg. & Rawle, 587.

be forced to give their verdict against their judgments,' it is said in a curious note appended to the remark, that 'it is not a force when any of the jurors are compelled to comply under the peril of being starved to death; for how can it be expected,' demands the annotator, 'that twelve considering men should, in all cases, happen to be of the same sentiments?' It is certainly easier to answer his question than to assent to the truth of his remark. Originally, it would seem, refreshments were not allowed, even by consent of the prisoner, and it was left to modern times, as is justly remarked by Mr. Justice DUNCAN, in *The Commonwealth v. Cook*, to allow them, at first by consent, and afterwards by the inherent power of the court, so that the use of hunger as an instrument of compulsion, like many other matters, such as fining jurors for obstinately holding out, seems to have passed away in the darkness in which it was engendered. The ancient form of the tipstaff's oath, indeed, remains; but, with the implied qualification of being controlled by the directions of the court, it affords an admirable security against abuses that would infallibly rush in, were jurors allowed an unlimited license to receive refreshments, at their pleasure, or through any other channel than the order of the court. Through that channel, a reasonable supply at the public charge, and in quantity so restricted as to guard against excess, is a matter, not of indulgence, but of right, appertaining to the jurors, not as a body, but as individuals, and without being subject to the control of the majority. What was said by Chief Justice TILGHMAN, in the passage just quoted, was doubtless drawn from recollection, and used in illustration of the matter more immediately before the court. The application of torture in order to force the conscience, was abhorrent to every feeling of his nature, and had the attention of that humane and excellent judge been drawn directly to the subject by the occasion, there is little hazard in affirming that the result would have been the adoption of a sentiment in accordance with that which is now expressed.

"If, then, the indisposition of the jurors was induced, without the prisoner's assent, and might have been removed, what

was the course dictated by analogy from parallel cases? Undoubtedly, to recruit their forces by food and refreshments. If a juror be taken ill, says Mr. CHITTY, 1 Cr. Law, 529, another juror may be permitted to attend him, and if it appears that there is a probability of speedy recovery, he may be allowed proper refreshment. It is only in the absence of a probable ability to return to his duties, that a new panel may be ordered. There cannot be a doubt that the indisposition of the two jurors here would have been speedily removed by appropriate nourishment, and their temporary exhaustion, therefore, was not an available ground to divest the interest which the prisoner had in the verdict. Her plea of *auter fois acquit* had not been mentioned by the production of a sufficient record, but her other special plea is available in law, and we are of opinion that the demurrer ought to be overruled. She is, therefore, discharged.”²⁶

A jury may be impaneled and sworn, and then dismissed, before the prisoner is arraigned, without barring subsequent prosecution,²⁷ as a general rule.

Where a juror is taken sick at any time before verdict rendered, so as to compel the discharge of the panel, there may be another trial.²⁸ And so, if, after a case is given to the jury, one of the jurors separates from the rest, so that they must be discharged.²⁹ And so, if the term expires while they are deliberating, and consequently there is no verdict.³⁰

In Ohio, one was accused of a felony. After the jury were sworn, one of the jurors arose and stated that he had been a member of the grand jury by whom the indictment was found — he having failed to respond to inquiries on this matter before the impaneling. The defendant’s counsel objected to proceeding with the jury impaneled, and also declined to waive any of the defendant’s rights. The jury was then discharged, and another impaneled, the defendant objecting to further proceedings. It was held that as the discharge of the first jury was

²⁶ *Commonw. v. Clue*, *supra*.

²⁹ *State v. Hall*, 4 Halst. (N. J.), 256.

²⁷ *U. S. v. Riley*, 5 Blatch., 204.

³⁰ *State v. Tillotson*, 7 Jones, 114.

²⁸ *Commonw. v. Merrill*, Thatch (Mass.) Cr. Cases, 1.

the necessary result of sustaining the objection interposed by the defendant himself, this did not take place without his consent, and therefore was no bar. The decision rests on the ground that by not challenging at the proper time he had waived the right of challenge, and the subsequent assent to discharging the jury prevented the bar.³¹

The course of authority is, I think, sufficiently clear in the foregoing citations, wherein I have thought it more satisfactory to state the doctrines of the law in the language of the courts. And we will pass on to another point.

SEC. 414. In civil actions, it must appear that the issue in a former action was the same as that whereon it is offered as a bar, or conclusive evidence. And the same rule prevails in criminal actions, and accompanied by a far greater strictness and technicality, as, for example, in Massachusetts, it has been held, that an indictment for burning the barn of A, and another alleging that it was the barn of B, are not for the same offense;³² and, in the same case, that if it is given as the barn of A and B, it is not the same with an indictment alleging that it was the barn of A alone; and in Texas, it is held that a prosecution for stealing certain money belonging to A will not bar a subsequent prosecution for stealing the same money as belonging to B.³³ And, also, in Massachusetts it is held, that a charge of doing a particular act with a criminal intent, is not the same as a charge of doing the act without an allegation of criminal intent.³⁴ And the theft of a *horse* is in Texas different from the theft of a *gelding*.³⁵

The test of identity is, that the same evidence will sustain the accusation in both actions; that is to say, the plea of *auter fois convict* or *acquit* is available whenever the prisoner might have been convicted on the first indictment by the evidence necessary to sustain the second.³⁶ In Ohio, it has been held, on this rule, that, as the names Horace B. Westerhaven, and Horace E.

³¹ *Stewart v. State*, 15 O. St., 159. ³⁴ *Commonw. v. Bakeman*, 105 Mass., 53.

³² *Commonw. v. Wade*, 17 Pick., 398. ³⁵ *Swindel v. State*, 32 Tex., 102.

³³ *Morgan v. State*, 34 Tex., 677. ³⁶ *Roberts v. State*, 14 Ga., 11.

Westerhaven, are different names, designating different persons, an indictment against the one is not the same as an indictment against the other; and although the middle initial in a name needs not to be given, yet, if it is given, it becomes an essential part of the description, and must be proved as laid.³⁷ But changing the name of the accusation does not destroy identity.³⁸ And the two prosecutions need not be in the same language, or form of allegation.³⁹ Chief Justice SHAW remarks very forcibly that, "It must appear to depend upon facts so combined as to constitute the same legal offense, or crime. It is obvious, therefore, that there may be great similarity in the facts, where there is a substantial legal difference in the nature of the crime; and, on the contrary, there may be considerable diversity of circumstances where the legal character of the offense is the same; as where most of the facts are identical, but by adding, withdrawing or changing some one fact, the nature of the crime is changed, as where one burglary is charged as a burglarious breaking and stealing certain goods, and another as a burglarious breaking with an intent to steal. These are distinct offenses. *Rex v. Vandercomb*, 2 Leach, 816. So, on the other hand, where there is a diversity of circumstances, such as time and place, where time and place are not necessary ingredients in the crime, still the offenses are to be regarded as the same. In considering the identity of the offense, it must appear by the plea that the offense charged in both cases was the same in *law* and in *fact*. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact. As, if one is charged as accessory before the fact, and acquitted, this is no bar to an indictment against him as principal. But it is not necessary that the charges in the two indictments should be precisely the same; it is sufficient if an acquittal from the offense charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus,

³⁷ *Price v. State*, 14 Ohio, 425.

³⁸ *Holt v. Georgia*, 38 Ga., 189.

³⁹ *Wilson v. State*, 24 Conn., 63.

an acquittal on an indictment for murder, will be a good bar to an indictment for manslaughter, and *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for, in the first instance, had the defendant been guilty, not of murder, but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder.”⁴⁰

SEC. 415. The identity must be alleged by the plea, as is above stated, in all cases; and must be clearly shown by the evidence,⁴¹ the burden of proof being on the defendant, who has all the advantage thereof. But, as before remarked, the form of action needs not to be the same in both actions. Thus, a former conviction for a breach of the peace is a bar to a prosecution for an assault and battery committed in the breach of the peace; on the ground that the breach of the peace being included in the assault and battery, the defendant could not be convicted of the latter without also being convicted of the former.⁴² But it is held in Oregon that a conviction under a city ordinance for “disturbing the peace,” or “fighting in the street,” is not a bar to an indictment in the Circuit Court for an assault and battery committed at the same time; because the two offenses are not identical, the one being a violation of a police ordinance of the city, the other a violation of the criminal code of the State, and the imposition of a fine by a city court exercising police authority will not relieve the offender from liability to the State.⁴³

SEC. 416. The question of two-fold punishment, incidentally referred to in the last section above, has been decided in this way: that the same act violating a state law and the law of the United States, and, on the same principle, the same act violating a state law and a municipal ordinance is liable to punishment by both. Thus, the constitutional power of Congress to provide for punishing the counterfeiting of the securities of

⁴⁰Commonw. v. Robey, 12 Pick., 503. ⁴²Commonw. v. Hawkins, 11 Bush, 603.

⁴¹State v. Wister, 62 Mo., 592.

⁴³State v. Sly, 4 Oregon, 279.

the United States, does not prevent a state from passing a law against circulating such counterfeits.⁴⁴ However, the court places this on the ground that counterfeiting coin, and passing it, are different offenses, which, I think, is hard to make out, inasmuch as counterfeiting coin, except with the intention of passing it to defraud the government or individuals, is not an offense at all. It has been held that one might be liable under state and national law for harboring fugitive slaves.⁴⁵ In Indiana it has been held that where a city charter gives a mayor, in civil and criminal cases, the jurisdiction of a justice of the peace, and provides for the recovery of a penalty in an action of debt for the violation of any ordinance, by law, or police regulation, and an amendment to the charter, made afterwards, declares the sale of spirituous liquors, in any quantity, except for the necessary arts, etc., to be unlawful in that city, and authorizes the council to provide penalties to a limited amount to enforce the provisions of the charter, and gives the mayor exclusive jurisdiction of all offenses committed against it, for the recovery of the penalties prescribed by the ordinances enacted under it, all prosecutions so authorized are civil suits and not criminal prosecutions, and are, therefore, no protection against a punishment by the state for the same act.⁴⁶ And, moreover, under a statute giving judicial powers to a mayor, so that he is both mayor and judge, he is a state officer in the latter capacity, and he may, on the same day, punish the same act twice—as mayor, for violating the city ordinances, and as judge, for violating the state law; and one prosecution will not bar the other.⁴⁷ And it is certain that a city charter does not supersede the general law of the state, in any particular, within a city, without an express repeal, or else repugnant enactments—otherwise, if the same powers are conferred, it has only the effect of giving concurrent authority to the municipality;⁴⁸ and, in such case, the punishment may be either by one or the other, and not by both, I suppose. But the true theory, I judge, is the one prevailing in Indiana,

⁴⁴ *Fox v. Ohio*, 5 How., 410.

⁴⁷ *Waldo v. Wallace*, 12 Ind., 570.

⁴⁵ *Moore v. Illinois*, 14 How., 13.

⁴⁸ *Gardner v. People*, 20 Ill., 432.

⁴⁶ *Lery v. State*, 6 Ind., 281.

and the reason given for it by the court is a sound one, namely: "The grant of a right to the common council of a city to fix the rate of all licenses for retailing liquors, etc., must be construed to mean for city purposes only. Corporate powers are granted for the benefit of the corporators. They afford additional privileges, and impose additional obligations; but do not exempt such corporators from any of their obligations as citizens of the county and state in which the corporation is situated. As inhabitants of incorporated cities, or towns, they may be taxed for city or town purposes, but they are not thereby relieved from the necessity of contributing their proportion of the public charges in their capacity as citizens of the state at large. We do not mean to say that the legislature cannot release them, for the time being, from such obligations; but such a release must be in express terms, and cannot be implied from similar obligations imposed upon them in their corporate capacity."⁴⁹ However, charters of cities are as much subject to the control of state laws passed afterwards, as individuals are.⁵⁰ And a striking reason for this is given by the Missouri court, namely: "The state courts would also be powerless 'to prohibit gambling and gaming houses,' and the morals of the inhabitants be exclusively left in the keeping of the trustees of the town. A statute working such important changes in society, should be strictly construed, and not receive a latitudinal construction."⁵¹

SEC. 417. It is on somewhat the same principle as that above elucidated that a punishment in one state does not bar a prosecution for the same act in another, as if the crime is committed on a stream which forms the boundary line between two states.⁵² And if one steal goods in one state, and carry them into another, the *continuance* is held to be a new crime, in the latter state, and he may be punished in both,⁵³ although, where an act punishable both under state law and the United States law is punished by the authorities of the state, it has been said by Chief Justice TANEY that a United States court might properly sus-

⁴⁹ *Sloan v. State*, 8 Blackf., 363.

⁵² *Phillips v. State*, 55 Ill., 429.

⁵⁰ *People v. Morris*, 13 Wend., 331.

⁵³ *Commons v. Andrews*, 2 Mass., 22.

⁵¹ *Baldwin v. Green*, 10 Mo., 411.

pend sentence until it could represent the facts to the president with a recommendation to enter a *nolle prosequi*, or grant a pardon.⁵⁴ Yet punishment in one sovereignty is no bar to punishment in the other.⁵⁵

SEC. 418. The matter of divisible and indivisible offenses rests on much the same principle as to prosecutions that divisible and indivisible contracts or torts do in civil actions, namely, proceeding for part of a crime will bar further prosecution for the remainder omitted in the first indictment. Whether certain criminal acts constitute a single crime must be determined by the circumstances of each particular case, as, for example, if one utters at a bank several forged checks at one time, and by the same act, he commits but one crime.⁵⁶ And under a statute against "buying, receiving, or aiding in the concealment of stolen goods," if all three of these modes of violation are charged together in an indictment, there is but one crime alleged.⁵⁷ There are authorities opposed to this—as, for instance, *U. S. v. Bereman*, 5 Cranch C. C., 412. But it has been well remarked by the Iowa court that, "It seems impossible to maintain the doctrine of such cases on principle. If the stealing of various articles, owned by different individuals, constitutes as many distinct offenses as there are owners, then they cannot be united as one offense, in the indictment. If one should, at the same time, and as one act, steal two watches, each of the value of fifteen dollars, and owned by different persons, and another person should steal, in the same manner, two articles of like value, owned by one person, it would be difficult to give a reason satisfactory to the legal mind why one should expiate his offense with a fine of two hundred dollars, or imprisonment in the county jail for sixty days, whilst the other should be sent to the penitentiary for the period of five years. If A should, at one time and as one act, hand to a merchant four counterfeit bills, each of the denomination of five dollars, and have the amount

⁵⁴ *Hammond v. State* (citing Chief Justice TANEY's decision), 14 Md., 152.

⁵⁵ *Ibid.*; *U. S. v. Marigold*, 9 How. (U. S.), 569.

⁵⁶ *State v. Egglesht*, 41 Ia., 578.

⁵⁷ *State v. Nelson*, 29 Me., 335.

passed to his credit, and B should, in like manner, pass one bill of the denomination of twenty dollars, we would much doubt whether the ‘perfection of human reason’ would be evinced in sending B to the penitentiary ten years for one crime, and A forty years for four crimes.⁵⁸

A prosecution based on any part of a single crime, as, for one horse where two were stolen, bars any further prosecution based either on the whole or the remaining part.⁵⁹

Yet a single act may be of such a character as to embrace two substantive crimes, as, for example, one may be punished for keeping a drinking house and tippling shop, and also for being a common seller of intoxicating drinks. And a man who in company with others commits an assault and battery, or any other illegal act, in a violent or tumultuous manner, may be punished as a rioter, and again as if he had committed the unlawful act alone. Or, if an assault and battery is committed in the presence of a court, the offender may be punished for contempt, and also for the assault and battery.⁶⁰

SEC. 419. A prosecution, in a court without jurisdiction, will not bar a subsequent prosecution in a court having jurisdiction.⁶¹ Or a conviction procured by the fraud of the defendant will be no bar—as, for instance, where “to appearance the complaint was lodged and the prosecution managed by disinterested individuals, and for the purpose of enforcing due justice, when, in reality, all was a puppet show, and every wire moved by the offender himself.”⁶²

SEC. 420. For further information on the subject of this chapter, I must refer to those writers who have professedly treated on criminal law. Thus much was due to our present investigation of *res adjudicata*, to show the bearing of the doctrine on criminal procedure. It remains to remark that public prosecutions do not bar civil actions relating to the same matter, in any case, because, in the two kinds of proceedings, both

⁵⁸ 41 Ia., 578, *supra*.

⁶¹ *Reich v. State*, 53 Ga., 74.

⁵⁹ *Jackson v. State*, 14 Ind., 328.

⁶² *State v. Little*, 1 N. H., 258.

⁶⁰ *State v. Inness*, 53 Me., 537.

the parties and the substance are different. And the same principle applies to actions *ex contractu* and actions *ex delicto*. Thus, while, in the matter of theft, it has been held, for the sake of public justice, that the private action of trover is suspended until the public prosecution ends, this is a mere arrangement of precedence, and the public wrong does not merge the private one, nor the prosecution supersede the private action. The purposes of the two procedures are altogether different, and neither an acquittal, nor a conviction and sentence, discharges the private right to seek redress.⁶³ And so, a judgment rendered in a criminal prosecution is not admissible as evidence in a civil cause, even when the same questions of fact are at issue in both.⁶⁴

SEC. 421. Where one is discharged on *habeas corpus*, a re-arrest is unlawful, the matter being *res adjudicata*.⁶⁵

⁶³ *Hutchinson v. Bank*, 41 Pa. St., 44.

⁶⁵ *Jilz's Case*, 64 Mo., 205.

⁶⁴ *Betts v. New Hartford*, 25 Conn., 184.

CHAPTER XXVII.

THE RULE OF RES ADJUDICATA AS TO THE COURTS ADJUDICATING.

Section 422. Rule applies to all Courts of competent Jurisdiction.

- 423. Law and Equity — Foreign Courts.
- 424. Extent of Rule as between different Courts.
- 425. Probate Courts.
- 426. Rule as to Probate Findings.
- 427. Special Statutory Courts — Indian Referees, etc.
- 428. Inferior Courts.
- 429. Effects of a Division in a Court.

SECTION 422. According to the rule laid down in the Duchess of Kingston's Case, a judgment to be conclusive afterwards must be pronounced by a court of competent jurisdiction. And under this, we may state, as a corollary, that the doctrine relates to *all courts* of competent jurisdiction in the matters produced as having been passed upon judicially, and therefore settled between the parties for all purposes and for all time.

SEC. 423. And so law courts and equity courts stand on the same footing, and also domestic and foreign tribunals, in large measure. Thus, the Supreme Court of the United States say: "It is not denied, as a general rule, that a fact which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties in the same or any other court. Hence, a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this,

there is, and ought to be, no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is, therefore, not confined in England, or in this country, to judgments of the same court, or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries. It applies to sentences of courts of admiralty, to ecclesiastical tribunals, and, in short, to every court which has proper cognizance of the subject-matter, so far as they profess to decide the particular matter in dispute."¹ The Vermont court says, as to the binding effect of legal adjudications on courts of equity, very clearly and forcibly: "It is claimed, in this case, on the part of the defense, that the adjudication at law is conclusive, and the proposition seems to be that where a surety has been sued at law, and makes a defense which has been overruled as insufficient, he cannot afterwards, on the same state of facts *only*, obtain relief in equity. This position is evidently based upon the doctrine that the decision of a court of competent authority is binding upon all courts of concurrent power, which we admit is a doctrine that does, or should, pervade every well regulated system of jurisprudence, and should be a rule of universal law, having for its foundation the wisest policy and dictated from the necessity of the case. The interests of suitors, as well as the body politic, imperiously demand that when legal controversies have been once heard and passed upon by a competent tribunal, there should be an end to litigation. If we assume that a court of law and a court of equity had clearly concurrent *jurisdiction* power to grant relief to the surety in this case, upon the same state of facts, it would seem to be somewhat difficult to maintain that a court of equity is

¹ *Hopkins v. Lee*, 6 Wheat., 113; *Babcock v. Camp*, 12 Ohio St., 36.

not bound by the adjudication at law. If the matter set up in this bill was cognizable at law, and should have availed the surety as a defense in that forum, I should apprehend that it could hardly be maintained that the adjudication at law is any the less conclusive even though it should be conceded that that adjudication was unsound. It is often said that a court of chancery can, and will in many cases, relieve against the effects of an adjudication at law, which is no doubt true, but upon well established principles of equity, the relief must, however, arise from new matter proved to have been discovered subsequent to the trial at law. If this was not the rule, a door would be open to great vexation, and the cause would never be at rest. Lord REDESDALE well said that 'It was more important that an end should be put to litigation than that justice should be done in every case,' and in *Bateman v. Welloe*, 1 Sch. & Lefroy, 204, he lays the rule down that 'it is not sufficient to show that injustice has been done, but it must appear that it has been done under circumstances which authorize the court to interfere, because,' he adds, 'if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take upon itself to enter into it again.' Lord Chancellor TALBOTT says, 'the relief must be confined to new matter proved to have been discovered since the trial.'"²

However, where a party has equitable rights not cognizable at law, he may avail himself of such, even after he has failed on the legal grounds involved in his case.³

Where a legal court and an equity court have concurrent jurisdiction, as, for example, on the subject of fraud, a decision in the one will be conclusive in the other.⁴

Sec. 424. Moreover, the principle has been extended—as between different courts—to matters which might have been adjudicated. Thus the South Carolina court say: "The general rule certainly is, that the judgment of a competent court is binding and conclusive upon the parties, and will not be reviewed

² *Dunham v. Donner*, 31 Vt., 256.

⁴ *Miles v. Caldwell*, 2 Wall., 39.

³ *Ibid.*, 267.

or reversed, by any court possessing concurrent jurisdiction. It is not only binding and conclusive as to all questions of law and fact that were made upon the first trial, but as to all questions of law and fact which, from the organization and powers of the court, *might have been submitted*. The rule extends even to foreign judgments, and proceeds from the comity of nations, and of courts, and the necessity of putting an end to legal controversies, and relieving judicial tribunals of the burden of repeatedly adjudicating the same matters. It is a rule of policy; nor is it unjust. Surely a party has no right to complain of the arbitrament of a forum of his own election. And his complaint would be equally unfounded if a judgment has been rendered against him in consequence of his own neglect, or unskillfulness in developing the proper issues for the decision of the court, or presenting, in a proper manner, the evidence that was within his reach.”⁵

SEC. 425. And thus, a probate decree refusing to set aside a sale of lands of an estate under a former probate order, as void for want of jurisdiction, will bar a subsequent bill in chancery seeking to set aside the sale on the ground of fraud, on the same facts formerly alleged with others as showing want of jurisdiction,⁶ although errors of fact or law in the final settlement, it is held in Alabama, may be corrected by bill in chancery, even when the distributees have certified to the court that they have found the accounts correct.⁷ Yet an order on final settlement, discharged by payment of the amounts for distribution assessed against the administrator, will bar another citation to make settlement although the administrator may not yet be discharged of his office.⁸

SEC. 426. As to probate matters, generally, the Maryland court announces the rule to be that: “In regard to the decrees and sentences of courts exercising any branch of ecclesiastical jurisdiction, the same general principles govern. The principal

⁵ *Tate's Ex'rs v. Hunter*, 3 Strob. Eq., 139.

⁶ *Balkum v. Satcher*, 51 Ala., 82.

⁷ *Monnin v. Beroujon*, 51 Ala., 197.

⁸ *Tarver v. Tankersley*, 51 Ala., 310.

branch of this jurisdiction in existence in the United States is that which relates to matters of probate and administration. And as to these, the inquiry is whether the matter was exclusively within the jurisdiction of the court, and whether a decree or judgment has been directly passed upon it. If the affirmative be true, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as in assignments of dower, and some other cases of jurisdiction conferred by particular statutes, the decree stands upon the footing of a judgment at common law.⁹ And, while the judgments remain unreversed and unappealed from, they rest upon the same foundation of principle and of policy which sustains the judgment of any other court,¹⁰ so that even a Supreme Court cannot collaterally review them;¹¹ as, for example, to inquire into the legality of the appointment of a guardian,¹² or the appointment or removal of administrators,¹³ or assigning a widow's allowance,¹⁴ or declaring a will duly executed,¹⁵ or a decision as to the validity of a will of personal estate,¹⁶ or a decree of distribution.¹⁷ However, it is held in New York, that a sentence in relation to the competency of a testator to make a will of personal property—the surrogate having no authority whatever to determine a right claimed under a will as to real estate, or decide any question which could deprive the heir or devisee of a jury trial—is not conclusive on the parties to that litigation, as to such competency relating to the will of personal property, in a subsequent suit as to the validity of a devise of

⁹ *Cecil v. Cecil*, 19 Md., 79.

¹⁰ *Dickinson v. Hayes*, 31 Conn., 427.

¹¹ *Lawrence v. Englesby*, 24 Vt., 45.

¹² *Farrar v. Olmsted*, 24 Vt., 123; *Cailleteau v. Ingouf*, 14 La. An., 623.

¹³ *Steen v. Bennett*, 24 Vt., 303.

¹⁴ *Litchfield v. Cudworth*, 15 Pick., 23.

¹⁵ *Vanderpoel v. Van Valkenburgh*, 2 Selden, 190.

¹⁶ *Bogardus v. Clark*, 4 Paige, 623.

¹⁷ *Loring v. Steineman*, 1 Metc. (Mass.), 204.

real estate contained in the same will,¹⁸ because the issues are different, I suppose; in part, at least.

Where a husband died without living issue, and after his death a child was born of his wife, who applied for letters of administration on the estate of the child, and the father of the deceased resisted the application on the ground that the child was not born alive, but, on issue joined, was defeated thereon, and the letters were granted, the judgment was held conclusive that the child was born alive, in a subsequent application of the father of the deceased to contest the administrator's accounts.¹⁹

An order granting a widow's allowance is a judgment, and is conclusive against an answer to an application to the court to compel the payment thereof.²⁰

SEC. 427. The same principles apply to special statutory courts. When the jurisdictional facts are shown to exist, the judgment of such a court is as conclusive as that of any other,²¹ or even where the determination of any question involving discretion is committed to any officer, even if that officer should be an Indian chief, it appears; as when it was provided by treaty that the "Osage half-breeds, not to exceed twenty-five in number, who have improvements on the north half of the lands sold to the United States, shall have a patent, said half-breeds to be designated by the chiefs and head men of the tribe," it was held that such designation actually made was conclusive, so that in a suit brought by the grantee of a patentee thus designated, for the possession of the land, it could not be questioned whether the patentee was an Osage half-breed, or whether he had the requisite improvements on the land to obtain the patent; and, under another similar provision allowing Indians to make selections of eighty acre tracts, the choice to be approved by the Secretary of the Interior, it was held that after such approval and the issuance of the patents, the holder of a subsequently acquired title could not show that the

¹⁸ *Bogardus v. Clark*, *supra*, 627. ²⁰ *Leaverton v. Leaverton*, 40 Tex., 218.

¹⁹ *Garwood v. Garwood*, 29 Cal., 515. ²¹ *Secombe v. R. R.*, 23 Wall., 119.

patentees had not complied with the necessary conditions for receiving the patents.²²

SEC. 428. As to inferior courts, generally, their determination of matters within their jurisdiction—that jurisdiction appearing on the face of their proceedings—is as conclusive as those of superior and general authority.²³ For “the conclusive effect of a judgment as evidence, rests upon the authority of the court, upon its acting within its jurisdiction, upon its preserving its decisions in proper records, and upon the policy and necessity of determining by law the end of controversy. These reasons apply to the judgments of justices of the peace, as well as to any others. The argument that as justices have no clerks, or seals, and cannot authenticate records in the mode prescribed in the act of Congress therefore their judgments are not entitled to full faith and credit, seems to rest upon the manner in which the court is organized, and its inability to comply with a particular form of authenticating its records, rather than upon the broader and more solid ground of the authority and jurisdiction of the court, and the interest of the community that there should be an end of litigation.”²⁴ The mere fact of the limited jurisdiction belonging to an inferior court cannot, in any wise, impair or diminish the conclusiveness of its judgments on matters within its jurisdiction,²⁵ for it is, notwithstanding, a competent tribunal, appointed by law to pass upon such matters,²⁶ and even if erroneous, having jurisdiction, its judgments can only be attacked directly.²⁷ And the same principles apply also to a mayor’s court,²⁸ and to all courts of limited and inferior jurisdiction.

SEC. 429. The question has sometimes arisen as to judgments rendered by a divided court, where the court is constituted by several judges. It is expressly held that, in such a

²² *Lownsberry v. Rakestraw*, 14 Kan., 152.

²³ *Farr v. Ladd*, 37 Vt., 158.

²⁴ *Carpenter v. Pier*, 30 Vt., 86.

²⁵ *Bellinger v. Craigue*, 31 Barb., 536.

²⁶ *Cumberland Coal & Iron Co. v. Jeffries*, 27 Md., 534.

²⁷ *Shaver v. Shell*, 24 Ark., 122; *Burke v. Elliott*, 4 Ired., 357.

²⁸ *Harrison v. Columbus*, 44 Tex., 420.

case; the opinion of the majority is the law of the case, and is as conclusive as a full concurrence. And where a court is equally divided, and thus the division operates merely as an affirmation, that affirmation is as conclusive as if determined on by all the judges together.²⁹ However, it is otherwise so far as the force of a case as a precedent is concerned, so that a question on which a court of appeal is equally divided must be considered open;³⁰ indeed, such *formal* affirmation cannot well settle a question of law as the basis of a precedent.³¹ The statement that a decision is rendered by a divided court is not to be understood as signifying that they were divided as to the question whether it should be rendered, but merely as to the questions of law which had been involved in it. "The statement is not intended to invalidate it as a decree, but to affect its value as a precedent in other cases. It is designed to be binding on the parties, and is so; and one of its effects is that it is a bar to another suit for the same cause."³²

²⁹ *Durant v. Essex Co.*, 7 Wall., 107. ³¹ *Bridge v. Johnson*, 5 Wend., 342.

³⁰ *Morse v. Goold*, 1 Kern., 285. ³² *Durant v. Essex Co.*, 8 Allen, 108.

CHAPTER XXVIII.

MILITARY COURTS.

Section 430. Kinds of Military Courts — Findings Conclusive.

- 431. Courts Established in Conquered Territory.
- 432. What Military Occupation is — Cession of Territory.
- 433. Res Adjudicata therein.
- 434. Application to our Civil War.
- 435. Cessation of Military Rule.
- 436. Civil Commission Courts under Occupation.

SECTION 430. These are two fold; courts martial having cognizance of naval affairs, and courts martial having jurisdiction on the land; to the latter of which are to be added, courts organized and established by an occupying military power for the trial of civil causes.

And, as to courts martial, proper, they are wholly independent of all control by civil courts, so long as they keep to their jurisdictional limits of power. "If a sentence be confirmed, it becomes final, and must be executed unless the President pardons the offender. It is in the nature of an appeal to the officer ordering the court, who is made by the law the arbiter of the legality and propriety of the court's sentence. When confirmed, it is altogether beyond the jurisdiction, or inquiry, of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or one in which, having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the statute for its exercise. In such cases, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he

may recover damages from them, on a proper suit in a civil court, by the verdict of a jury. Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial when the law for convening them and directing their proceedings of organization, and for trial, have been disregarded. In such cases everything which may be done is void; not voidable, but void, and civil courts have never failed, upon a proper suit, to give a party redress who has been injured by a void process or void judgment. In England it has been done by the civil courts ever since the passage of the 1 Mutiny Act of William and Mary, Ch. 5, 3d April, 1689. And it must have been with a direct reference to what the law was in England that this court said in *Wise v. Withers*, 3 Cr., 337, that in such a case, the court and the officers are all trespassers. When we speak of *proceedings* in a cause, or for the organization of the court, and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence, or law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law. Courts martial derive their jurisdiction from, and are regulated with us by, an act of congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms; or, they may get jurisdiction by a fair deduction from the *definition of the crime* that it comprehends and that the legislature meant to subject to punishment, one of a minor degree of a kindred character, which has already been recognized to be such by the practice of courts martial, in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts martial. And when offenses and crimes are not given in terms, or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses

by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, are well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offenses of which the different courts martial have cognizance. With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden, by law; or which are according to the laws or customs of the sea, civil courts have nothing to do, nor are they, in any way, alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided, by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate, or civil courts. But, we repeat, if a court martial has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress.”¹

It is manifest, then, that the findings of courts martial, within their sphere of jurisdiction, are conclusive, and binding on all other courts. And there can be no doubt that, in like manner, all matters determined therein are *res adjudicata*, so that they cannot be again inquired into by a court martial. And if this should be attempted, it would be such a usurpation of authority, as would require the interference of civil courts by a writ of *habeas corpus*.

SEC. 431. As to courts established by military power in a conquered territory, it is settled that the occupation of the territory suspends, or supersedes, the former sovereignty during its

¹ *Dynes v. Hoover*, 20 How., 81.

continuance. Thus, in 1814, the British captured our port of Castine, and collected customs there. After the peace, it was claimed that the United States had the *jus postliminii*, so as to be entitled to demand payment again of the duties on imports. But the claim was disallowed, and the Supreme Court said: "By the military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the full rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them; for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. * * * * The subsequent evacuation by the enemy, and the resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case."² And so, where a suit was brought, after California had been brought into the Union in consequence of the Mexican War, against one who had collected customs during the military occupation of California by the United States while hostilities were in progress, the action was held not maintainable.³

SEC. 432. But the occupation should be a mere displacement of the former and a substitution of the victorious sovereignty, and so the private rights and relations of the people should remain undisturbed. The ancient doctrine of absolute subjection—in the pomp of which the Romans and other victors revelled in the most despotic sway, at times, even to the carrying away of the inhabitants into other countries, such as the transportation of the Jews into Egypt, and elsewhere, on

² *U. S. v. Rice*, 4 Wheat., 254.

³ *Cross v. Harrison*, 16 How., 200.

the downfall of Jerusalem, and to the arbitrary deprivation of liberty, and the right to life itself—has utterly vanished from among the civilized nations of the earth. And thus, the Supreme Court of the United States say, in relation to the occupation of foreign territory by our nation: “Upon the acquisition, in the year 1846, by the arms of the United States, of the territory of New Mexico, the civil government of this territory having been overthrown, the officer, General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional or temporary government for the acquired country. By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were, in their nature and character, found to be in conflict with the constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain. Amongst the consequences which would be necessarily incident to the change of sovereignty would be the appointment or control of the agents by whom, and the modes in which, the government of the occupant should be administered—this result being indispensable in order to secure those objects for which such a government is usually established. This is the principle of the law of nations as expounded by the highest authority. In the case of *The Fama*, 5 Robinson, 106, Sir WILLIAM SCOTT declares it to be the ‘settled principle of the law of nations that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property, not taken from them by the orders of the conqueror, remain undisturbed.’ So, too, it is laid down by Vattel, Book 3, Cap. 13, § 200, that ‘the conqueror lays his hands on the possessions of the state,

whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is that they only change masters.' In the case of *The United States v. Perchiman*, 7 Peters, 86, 87, this court have said, 'It may be not unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world, would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed.'⁴

Moreover, the rule is the same in the cession of territory from one nation to another: "A cession of territory is never understood to be a cession of the property belonging to the inhabitants. The king cedes that only which belongs to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals condemned by the practice of the whole civilized world. The cession of a territory by its name, from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."⁵

SEC. 433. The establishing of courts under the military occupation may be an essential part of the new machinery, but matters determined by the former courts between private parties or between the government and a citizen, would be conclusive on the new courts, which, in their turn, would also render conclusive judgments, to endure even should the provisional courts thus established give way to permanent courts of the conquering power confirmed in the perpetual possession by a treaty of peace, or otherwise. And, in the opinion before

⁴ *Leitensdorfer v. Webb*, 20 How., 177. ⁵ *U. S. v. Percheman*, 7 Pet., 87.

quoted from, in regard to the occupation of New Mexico, the court proceeds to say: "Accordingly, we find that there was ordained by the provisional government a judicial system, which created a superior or appellate court, constituted of three judges, and circuit courts in which the laws were to be administered by the judges of the superior or appellate court in the circuits to which they should be respectively assigned. By the same authority the jurisdiction of the circuit courts to be held in the several courts was declared to embrace, 1. All criminal cases that shall not be otherwise provided for by law; and 2. Exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes. Of the validity of these ordinances of the provisional government, there is made no question, with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them."

SEC. 434. The general principles above stated are, of course, applicable in large measure to the military occupation of the revolted states during our late civil war. But in the strict sense of the word, there could be no *conquest* of a portion of the nation's own territory. Yet "pending the war the revolted territory actually occupied by the military power of the United States was subject to the laws of the belligerent occupation. The authority of the conqueror, in such a case, is *ex necessitate* paramount. His title rests on force, and is measured by it. He may suspend the municipal laws of the state or district thus occupied, if the safety or interest of the parent government demands it; or otherwise, by permission, the private and municipal laws of such conquered territory remain in force."⁶

SEC. 435. And, in such case, the cessation of the military

⁶ *Rutledge v. Fogg*, 3 Cold., 560.

occupation must end the discharge of any office specially appertaining thereto; as is also the case in foreign occupations: "In our civil war the sovereign government of the nation having made conquest of, and holding firm occupation by such force of, the country within the scope and boundary in which the war existed, possessed the belligerent power to organize and enforce the government of the people within the country so occupied; and, as a means of so organizing and enforcing, government may rightfully appoint suitable functionaries, directly by the military commander of the forces occupying the country, or through the agency of elections held by the people themselves, pursuant to the orders of the military officer in command; it must, nevertheless, be held that the functionaries so created hold their offices by the military power, and no longer than until the war comes to an end and peace is restored, and the regular movement of the municipal government of peace is re-established. * * * The powers exercised by the military governor to establish government over the people, in the manner prescribed by the proclamation of January 7, 1864, find their sanction in the public law which authorizes the sovereign belligerent in a civil war to exercise upon the insurgent people to some extent the belligerent powers sanctioned by the laws of war in the case of an international war. The laws of war authorize the occupying conqueror to organize and establish government over the people of the hostile country subdued and held in firm occupation. The government so established endures for the time the belligerent occupation continues, and ends with the restoration of peace, and the resumption of the regular municipal government."⁷

SEC. 436. Having thus stated the necessary preliminary principles as to the rights of a conqueror to establish institutions of government and judicial tribunals by the force of military rule, which courts are then to be regarded as "courts of competent jurisdiction" within the meaning of the rule of

⁷ *Isbell v. Farris*, 5 Cold., 428, *passim*.

res adjudicata, to determine controversies between parties conclusively, we come to consider the bearing of the rule upon the determinations of such courts, so established in subversion of the usual machinery of the judicial branch of government in the territory thus occupied. The question was, soon after the close of the war, directly brought before the ordinary civil courts—original and appellate—of Tennessee, by a plea in bar of the former judgment of a tribunal known as the civil commission, established by military order in Memphis, in 1863, while the war continued. The plea set forth distinctly the residence of the parties at the time of the suit, the suspension of the civil courts, the fact and the purpose of the organization of the civil commission, the proceedings before it wherein the judgment was rendered, and the identity of the causes of action in the prior and present suit. The plaintiff demurred to the plea, whereon judgment was rendered for the defendant, and the plaintiff appealed to the Supreme Court, which said: "The defendant seeks to give effect to the judgment of this tribunal as *res judicata*, while the plaintiff denies to it any validity whatever, and insists that the proceeding was *coram non judice*, and void. No objection is stated to the organization of the court, its mode of proceeding, or the forms of trial, judgment or execution; but it is insisted that such a court is unknown to the constitution and laws of the state or of the United States, and that it was not within the power of the military commander to create it.

"The legal principles essential to the proper solution of the question involved seems to have been fully considered and settled in several recent adjudications by this court. [Here follow citations from 3 Cold., 554, and 5 Cold., 426, *supra*, and the court then proceeds.] These elaborate quotations are given to show that the questions as to the power of the commander of the military forces of the United States, in any district in the insurrectionary states, held in firm possession by force of arms during such belligerent occupation, to establish such temporary government in such district, or any part thereof, as he might see proper, and to appoint and control the necessary

officers and agents, and to prescribe the modes in which such governments should be administered, are not open questions in this court. This right to establish government is not at all dependent upon the right of conquest, but is treated as incident to the mere right of belligerent occupation. A nation cannot conquer its own territory, but it may subdue and occupy such portions of it as are made the theater of an insurrection against its authority. The right to govern, for the time being, is necessarily embraced in the right of subjugation and occupation. Halleck says, ‘If a fort, town, city, harbor, island, province or particular section of country, belonging to one belligerent, is forced to submit to the arms of the other, such place or territory instantly becomes a conquest, and is subject to the laws which the conqueror may impose on it; although he has not yet acquired the *plenum dominium et utile*, he has the temporary right of possession and government.’

“Government of such territory, while so held in military occupation, is no less a duty than a necessity; and the right to create a government, or rather the right to govern, implies the right to determine in what manner and through what agencies such government is to be conducted. The municipal laws of the place may be left in operation, or they may be suspended and other laws put in force. The administration of justice may be left in the hands of the ordinary officers of the law, or these may be suspended and others appointed in their place. Civil rights and civil remedies may be suspended, and military laws and military courts and proceedings may be substituted for them; or new tribunals may be established, and new legal remedies and civil proceedings may be introduced. Halleck, 380. The conqueror exercises, for the time being, the powers of a *de facto* government, and the jurisdiction and authority possessed and exercised by the tribunals created by him must depend upon his discretion. In this respect the act of every military commander is the act of the commander-in-chief until disapproved or annulled, and is, of

necessity, to be obeyed as such. Whatever the President of the United States, as commander-in-chief, might do, if personally present, may be done by the superior officer in command of any district, unless restrained by orders or by the peculiar nature of the service in which he is engaged.

"The establishment of legal tribunals for the adjudication and protection of civil rights is the most favorable condition for the conquered people. There is always more or less security in a judicial body organized according to the forms of law for the administration of justice, according to the rules that obtain in courts of judicature. There is a dignity and responsibility about such a position that does not fail to command a decent regard to the ordinary rules of justice and of right, or to mitigate the rigor of military rule to some degree of harmony with the humane theories of modern warfare. If, then, the power to create such civil courts exists by the laws of war in a place held in firm possession by a belligerent military occupation, and if their judgments and decrees are held to be binding on all parties during the period of such occupation as the acts of a *de facto* government, we are not able to see on what grounds we can refuse to them a like effect when pleaded as *res judicata* before the regular judicial tribunals of the state since the return of peace."⁸

⁸ *Hefferman v. Porter*, 6 Cold., 393, *passim*.

CHAPTER XXIX.

COURTS OF THE SOUTHERN CONFEDERACY.

Section 437. Authority of Confederate Courts.

438. Probate Courts as to Confederate Investments—Ordinary Business Transactions in Confederate Currency.

439. Probate Settlements—Alabama Court on Confederate Investments.

SECTION 437. A question may arise in regard to the authority of the confederate courts to bind parties by adjudications made during the civil war. For it is a fundamental rule, I think, that illegal or usurping courts, not having lawful jurisdiction, cannot make a binding decision merely by acting *de facto*. But, in regard to the courts of the southern confederacy, it may be observed, 1. That in general, the same state courts continued after the breaking out of the war that were in operation before, although, doubtless, some judges were elected under the confederate government in opposition to the regularly constituted authority of the United States. And 2. When the rebellion assumed such formidable proportions that our government was compelled to accord to the confederacy the ordinary rights of a belligerent, the occupation of the revolted states came necessarily under the control of the principles set forth in the preceding chapter. Being for the time the conqueror in possession, the confederacy had the right, under the law of nations, to organize a judicial system, and therefore the courts were endowed with a legitimate jurisdiction from the necessity of the case, and their decisions are, therefore, properly held conclusive, except so far as they were immediately directed to the work of promoting the rebellion.

SEC. 438. The qualification just stated has been carried so far that a majority of the Supreme Court of the United States — Justices SWAYNE, DAVIS and STRONG dissenting — have held that where an executor invested estate funds in confederate bonds, with the approval of a probate court, he could be held liable by the legatees afterward to pay the legacies in lawful money of the United States, on the ground that the investment was a direct contribution to the cause of the rebellion. On this matter Justice FIELD, delivering the majority opinion, says: "Upon the accounts presented by the executor to the probate court in Alabama for settlement, it appears that he received moneys from the sales of property belonging to the estate of the testator amounting to over seven thousand dollars, and invested the same in the bonds of the confederate states. By the decree of the probate court this investment was approved, and the executor was directed to pay the legatees their respective shares in those bonds. Now the question is whether this disposition of the moneys thus received, and the decree of the court, are a sufficient answer on the part of the executor to the present suit of the legatees to compel an accounting and payment to them of their shares of those funds. It would seem that there could be but one answer to this question. The bonds of the confederate states were issued for the avowed purpose of raising funds to prosecute the war then waged by them against the government of the United States. The investment was, therefore, a direct contribution to the resources of the confederate government; it was an act giving aid and comfort to the enemies of the United States, and the invalidity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the courts of the United States. No legislation of Alabama, no act of its convention, no judgment of its tribunals, and no decree of the confederate government could make such a transaction lawful.

"We admit that the acts of the several states, in their individual capacities, and of their different departments of government, executive, judicial and legislative, during the war, so

far as they did not impair, or tend to impair, the supremacy of the national authority, or the just rights of citizens under the constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states, touching these and kindred subjects, where they were not hostile in their purpose, or mode of enforcement, to the authority of the national government, and did not impair the right of citizens under the constitution. The validity of the action of the probate court of Alabama, in the present case, in the settlement of the accounts of the executor, we do not question, except so far as it approves the investment of funds received by him in confederate bonds, and directs payment to the legatees of their distributive shares in those bonds. Its action in this respect was an absolute nullity, and can afford no protection to the executor in the courts of the United States. * * * * *

"It is urged by counsel, for at least a modification of the judgment of the Circuit Court, that the money received by the executor was in confederate notes, which, at the time, constituted the currency of the confederate states. It does not appear, however, that he was under any compulsion to receive the notes. The estate came into his hands in November, 1858, and no explanation is given for his delay in effecting a settlement until the war became flagrant. And even then he was not bound to part with the title to the property in his hands without receiving an equivalent in good money, or such at least as the legatees were willing to accept."¹

However, it has since been held by the same court that the doctrine announced above while applying to *investments*, does

¹ *Horn v. Lockhart*, 17 Wall., 579.

not apply to the ordinary transaction of business with confederate money. The court say: "The treasury notes of the confederate government were issued early in the war, and though never made a legal tender, they soon, to a large extent, took the place of coin in the insurgent states. Within a short period they became the principal currency in which business, in its multiplied forms, was there transacted. The simplest purchase of food in the market, as well as the largest dealings of merchants, was generally made in this currency. Contracts thus made, not designed to aid the insurrectionary government, could not, therefore, without manifest injustice to the parties, be treated as invalid between them. Hence, in *Thorington v. Smith*, this court enforced a contract payable in these notes, treating them as a currency imposed upon the community by a government of irresistible force. As said in a later case, referring to this decision, 'it would have been a cruel and oppressive judgment, if all the transactions of the many millions of people composing the inhabitants of the insurrectionary states, for the several years of the war, had been held tainted with illegality because of the use of this forced currency, when those transactions were not made with reference to the insurrectionary government.'"²

SEC. 439. Moreover, a judgment on final settlement of a probate account is not void because rendered by a court established by the confederate authority, but it is conclusive, and is a bar to any subsequent judgment in the same subject-matter.³

The Alabama court has indorsed the decision I have above quoted in regard to the investment in confederate bonds, by an executor (§ 438, *supra*), and say: "The recent case of *Hove v. Lockhart* (17 Wall., 570), announces the principle by which we propose to be guided in solving this vexed question. That principle is, that judicial proceedings in this state during the war, so far as they did not impair, or tend to impair, the

² *Confederate Note Case*, 19 Wall., 555.

³ *Foust v. Chamblee's Adm'r*, 51 Ala., 79.

supremacy of the national authority, or the just rights of citizens under the constitution, are to be treated as valid and binding. On this, and kindred distressing questions, the inevitable result of the war, and which are of especial interest to the people of ten states, and on which uniformity of decision is of vital importance, this court has often announced its purpose to follow the adjudications of the Supreme Court of the United States, when made. The settlement of these questions, so far as dependent on judicial decision, probably lies within the province of that tribunal. If it does not, yet, to avoid diversity of decision on these questions, and a conflict of authority, there is, it seems to us, an eminent propriety in state tribunals yielding obedience to its adjudications.”⁴ And again, “it is certainly the admitted doctrine that no sovereign is bound to execute within his dominion a sentence or judgment rendered out of it, or by a foreign jurisdiction. But this is a matter within the control of the sovereign authority, and if it is permitted, as it certainly was during the existence of the provisional government in this state, that such judgments should be enforced by execution, this court cannot say that this was an illegal exercise of the sovereign power where no fraud or irregularity is practiced.”⁵

⁴ *Riddle v. Hill's Adm'r*, Id., 228.

⁵ *Foster v. Moody*, Id., 477.

CHAPTER XXX.

JUDGMENTS WITHOUT VERDICT — CONFESSION, AGREEMENT, DEFAULT AND DEMURRER.

Section 440. General Principle Stated.

- 441. Finality a Requisite.
- 442. Judgments by Confession.
- 443. Consent by Municipal Corporation.
- 444. Agreed Statement of Facts — Confessions Informal, Joint, etc.
- 445. Defaults.
- 446. Demurrers.
- 447. Defective Declarations.
- 448. Demurrer on the Merits.
- 449. Demurrer on two Grounds — Presumption.
- 450. Demurrer to Pleas — Effect.

SECTION 440. The general principle regulating the conclusiveness of judgments is, that they must be final, and on the merits of the cause. There does not need, however, to be an express adjudication in order to conclude parties as to the issues of a controversy; but the issues may, in accordance with the principles we have already considered, be effectually implied, as, for instance, where, in an injunction suit, the answer of the defendant prays for damages, and the injunction is dissolved by a decree which is silent as to damages, this is held equivalent to a rejection of the claim for damages on the merits, so that it cannot afterward be again presented.¹ And so where there are several issues, and the

¹ *Rice v. Garrett*, 12 La. An., 755; *Spencer v. Bannister*, *Id.*, 766.

finding of any one of them for the defendant would defeat the plaintiff's recovery, the conclusive implication is that all the issues were passed upon, so that they are, each and severally, *res adjudicata*.² But it is otherwise with what manifestly does not go to the merits; as, where there is a departure in a rejoinder, a judgment on the issue formed by the departure will not bind the real issues.³ And so if a trial goes off on a mere technical defect, or because the cause of action has not accrued, or because of a temporary disability of the plaintiff to sue, it does not conclude even the immediate parties to it.⁴ Thus the New Hampshire court say, in regard to such an action: "That suit was brought by the plaintiff, and for the same injury for which this is brought, but was not, in point of form, an action that could be maintained. It was not decided upon the merits of the case, and the matters here drawn in controversy were not reached in that suit, nor is anything that was decided there sought to be litigated anew in the present action. All that was there settled was that, in an incidental matter not affecting the merits of the case now in controversy, the case made by the plaintiff was defective.⁵ If the pleadings do not set out the case, the judgment is not, in general, a bar.⁶ "It is undoubtedly true," says the Kentucky court, "that considerations of self-interest, convenience and economy would, in general, suggest to the party the propriety of amending such defective pleadings, rather than a dismissal of the action, and the commencement of another suit to obtain the same relief. But the law allows him a discretion to adopt either course."⁷ Moreover, where there is a dilatory plea and a plea to the merits together, it has been held that it will be presumed that the case was dismissed on the former only, and that the merits were not adjudicated.⁸

Where a refusal to award a *mandamus* does not include an adjudication on the merits of a question of title, the refusal cannot conclude the question of title,⁹ or if the failure is

² *Shaw v. Barnhart*, 17 Ind., 185.

⁶ *Smalley v. Edey*, 19 Ill., 211.

³ *Bell v. State*, 7 Blackf., 33.

⁷ *Birch v. Funk*, 2 Met., 549.

⁴ *Gray v. Dougherty*, 25 Cal., 272.

⁸ *Griffin v. Seymour*, 15 Iowa, 32.

⁵ *Brackett v. Hoitt*, 20 N. H., 260.

⁹ *Horton v. Hamilton*, 20 Tex., 612.

because the court has no jurisdiction, nothing is conclusive,¹⁰ even if the evidence is heard,¹¹ or if a suit fail because a promissory note, which is the basis thereof, is invalid as to one of two joint debtors, but not as to the other, this will not bar a subsequent suit against the other.¹²

Preliminary inquiries do not usually include merits, so as to become a bar, as, for instance, whether an accused person shall be committed or held to bail.¹³ And so, where the decision rests on an issue formed upon a dilatory plea, as, for example, a misjoinder of parties, it is not of such a nature as to constitute a subsequent bar.¹⁴

SEC. 441. The determination must also be final. Thus, an order on executory process is not a bar, since no issue is joined therein that can have the effect of the thing adjudged, the order being granted *ex parte* merely, and the only question examined being whether the evidence is sufficient to justify the fiat.¹⁵ But a judgment on a cause under a rule of court may be as conclusive as any other form of adjudication. For example, if instead of an injunction to arrest an execution, a procedure by rule is resorted to, the decision on this will bar a future application for an injunction on the same matter.¹⁶

As judgments must be final to operate as a bar, the pendency of a suit in any other court for the same matter, or any proceedings short of a final judgment, cannot have a conclusive effect.¹⁷ However, it is not a conclusive criterion whether a judgment is final that the entry employs or omits the customary words, "It is considered," etc. These words are not essential to finality or conclusiveness,¹⁷ although, as a matter of course, the judgment itself must be definite in its terms, so

¹⁰ *Taylor v. Larkin*, 12 Mo., 104.

¹¹ *Waddle v. Ishe*, 12 Ala., 308.

¹² *Stingley v. Kirkpatrick*, 8 Blackf., 186.

¹³ *Hyden v. State*, 40 Ga., 476.

¹⁴ *Vaughn v. O'Brien*, 57 Barb., 491.

¹⁵ *Humphreys v. Brown*, 19 La. An., 159.

¹⁶ *Trescott v. Lewis*, 12 La. An., 197; *Foss v. Brentel*, 14 La. An., 798.

¹⁷ *Whitaker v. Branson*, 2 Paine, C. C., 220; *Cook v. Litchfield*, 5 Sandf.

as to be readily understood, or no force can be attributed to it.¹⁸ As we have previously seen, the date of commencement of the action is a matter of no consequence, and if a judgment be really entered in a suit begun subsequently to that in which it is pleaded as a bar, it is as conclusive as if it had been first instituted.¹⁹

Nor is a judgment final if it be appealed from, until the question be settled on the appeal. While the appeal is pending, the judgment cannot be pleaded as a bar or given in evidence in another suit.²⁰ And so, where a cause is remanded, it is in no condition to be relied on as settling the controversy,²¹ because there is no final judgment therein,²² the very purpose of remanding being to send back the cause for a new trial, and a decision final upon the merits; and its effect, therefore, is merely to remit the parties to their original rights and obligations.²³ A judgment of reversal does not purport to be a decision of the merits of the controversy,²⁴ unless it is with definite directions to dismiss the action, or the like. On this last clause the language of the United States Supreme Court is apposite: "It is objected *in limine* that this court has no jurisdiction of the cause, on the alleged ground that the judgment rendered is not a final judgment. The order of the Circuit Court granting a preliminary injunction was, it is true, interlocutory; and if the judgment of the Supreme Court of the state had been limited to a simple reversal, the objection would have been tenable. The cause would then have remained in the Circuit Court for further proceedings. But the direction to that court, accompanying the reversal of its order to dismiss the complaint, made a final disposition of the cause. With the entry of that judgment the cause was at an end. With the peculiarities of the practice of the

¹⁸ *Tucker v. Rohrback*, 13 Mich., 75.

¹⁹ *Casebeer v. Moury*, 55 Pa. St., 422.

²⁰ *Sherman v. Dilley*, 3 Nev., 22.

²¹ *Aurora City v. West*, 7 Wall., 82.

²² *Board of Education v. Fowler*, 19 Cal., 13.

²³ *Hunt v. Company*, 1 Hilt., 164.

²⁴ *Vaughan v. O'Brien*, 39 How. Pr., 519.

Indiana courts we have nothing to do. If, upon an appeal from an interlocutory order, a final disposition of the merits of a cause can be made in that state, it is no concern of ours. If, by any direction, the entire cause is in fact determined, the decision when reduced to form and entered in the records of the court, constitutes a final judgment, subject, in a proper case, to our review, whatever may be its technical designation. The course adopted in this case was evidently pursued from the fact that the whole merits of the controversy had been considered on the motion for the preliminary injunction. The application was founded upon the alleged invalidity of the Act of 1872; no other matter was discussed, and all objections of form in the proceeding were waived that the validity of the act might be considered and determined. Being determined against the view advanced by the plaintiffs, the cause, so far as the state courts were concerned, was practically at an end.²⁵ And hence such a reversal would constitute the matters adjudged thus by the court of highest resort *res adjudicata* between the parties for all purposes and all time.

SEC. 442. With these needful preliminary remarks concerning the finality of judgments on their merits as alone constituting the conclusiveness thereof, we proceed to consider judgments without the interference of a jury; and *first*, of judgments by confession. And herein the rule is, when a judgment is freely and voluntarily confessed, with full knowledge of the facts, and without any fraud or collusion, it is conclusive as to all prior matters relating to it.²⁶ But it must be a personal confession, and a confession by the agent of a non-resident can avail nothing, unless, of course, he was specially authorized in due form to make it.²⁷ In Louisiana a decree by consent seems to be only valid if followed by an immediate execution thereof,²⁸ although, with judgments at law, it is otherwise.²⁹ Generally, indeed, confessions are closely

²⁵ *Commissioners v. Lucas*, 93 United States, 113.

²⁶ *Moore v. Barclay*, 23 Ala., 750.

²⁷ *Howell v. Gordon*, 40 Iowa, 302.

²⁸ *Greenwood v. New Orleans*, 12 La. An., 431.

²⁹ *Dunn v. Pipes*, 20 La. An., 276.

scrutinized, but are upheld as conclusive in the absence of all fraud or collusion. They should, however, usually be supported by a full and sufficient statement of facts.³⁰ And a compromise of a suit must be sustained by an adequate consideration.³¹ Where a case is re-opened, and then a consent for a certain sum is given upon a promissory note in suit, it will be held conclusive.³²

SEC. 443. Where a town is sued, a judgment may be entered against it by consent, and while the judgment remains in force the town cannot bring a cross-action against the plaintiff for having, in truth, no cause of action, but conspiring to obtain judgment from the town by false and fraudulent representations. In such a case the court said: "It is quite apparent that the town now proposes to retry the merits of the former suits; for the matter in issue there was whether the present defendant [former plaintiff] had the cause of action alleged in his declarations, and the foundation of the present suit is the denial of this. If it is open to the town now, we see no reason, in case it should prevail in this action, why the defendant may not, upon similar allegations in another suit, claim to retry this action. The settled policy of the law will not permit a matter once adjudicated to be thus drawn in question again between the parties while the original judgment remains in force;"³³ although parties may agree to reverse a judgment sometimes, and thus undo its effect and re-open the cause again, as to the original basis of the action.³⁴

SEC. 444. Where there is an agreed statement of facts, and therein is a fact misstated which would have changed the result if it had been correctly set forth, the result thereon will bind even a warrantor of title vouched in, although he did not appear in the action, provided the statement was agreed to in good faith.³⁵

³⁰ *Plummer v. Douglas*, 14 Iowa, 72.

³¹ *Ellis v. Mills*, 28 Tex., 585.

³² *Hanscom v. Heives*, 12 Gray, 334.

³³ *Hillsborough v. Nicholls*, 46 N. H., 385, and cases cited.

³⁵ *Maghee v. Collins*, 27 Ind., 84.

³⁶ *Chamberlain v. Preble*, 11 Grav. 370.

If a suit is dismissed "agreed," the proper interpretation is that the parties have adjusted the matter in dispute therein, and the legal effect of the judgment is that it will bar any other suit between the parties on the identical cause of action. For, the judgment rendered therein, on their agreement, merges the cause of action, and if, in such a case, the original cause of action has not been actually extinguished by payment, or other appropriate satisfaction, but by the agreement has been merely transformed into a new cause of action, there may be a subsequent suit on the new basis, but not on the old, because of the merger thereof in the agreed judgment.³⁷ Moreover, a judgment entered by agreement, in a court of general jurisdiction, and having power in a proper case to render such a judgment, will bind the agreeing parties, even if the pleadings would not authorize the judgment, if the case were contested. For the object of a complaint is to inform the defendant of the nature of the plaintiff's case, so that it is for the protection of the defendant that the requirement is made, and he has therefore a full right to waive the protection.³⁸ And a consent judgment has the effect of the thing adjudged,³⁹ provided it appears from the agreement itself, or by the aid of concurring circumstances, that the parties *intend* that the determination shall be final and complete between them,⁴⁰ and, in such case, every intendment will be made in favor of the regularity of the judgment.⁴¹ And a confessional judgment properly entered is, in the absence of fraud, conclusive as to the defense of usury, as well as every other defense existing at the date of the judgment.⁴² But where confession is made to defraud creditors, the judgment may be set aside on account of the fraud.⁴³

Even an informal confession is not to be held void, although it may be voidable at the instance of creditors; for to hold it void would be to place officers serving executory process under

³⁷ *Bank v. Hopkins*, 2 Dana, 395. ⁴¹ *Dean v. Thatcher*, 32 N. J., 473.

³⁸ *Fletcher v. Holmes*, 25 Ind., 463. ⁴² *Twogood v. Pence*, 22 Iowa, 543.

³⁹ *Dunn v. Pipes*, 20 La. An., 277. ⁴³ *Kirby v. Fitzgerald*, 31 N. Y., 424.

⁴⁰ *Whitaker v. Branson*, 2 Paine, 227.

it, in peril of an action as trespassers.⁴⁴ Thus, if it does not conform to the provisions of statute in stating the origin and particulars of the indebtedness, creditors may impeach the judgment for the want of conformity, but it is nevertheless valid between the record parties.⁴⁵

The legal consequences of a confession judgment is to shut out defenses or issues that might have been made available. As, for example, if a suit is commenced for malpractice, and afterward the defendant begins a suit for his fees in the services wherein the malpractice is charged, and obtains a judgment for such fees, by consent, while the malpractice suit is still pending, the judgment may be set up as an effectual bar against the malpractice action,⁴⁶ by supplemental answer under a code of practice, or by amendment otherwise.

A confession of judgment by one member of a co-partnership for the firm, is held only valid against the partner who makes it,⁴⁷ but will, nevertheless, bar a subsequent action against the others, on the ground of the indivisibility of the cause of action, and the consequent merger thereof in the judgment rendered against the confessing partner. But if a note be drawn in the firm name, though as a joint and *several* note, several suits can be brought thereon, according to a decision in Iowa, in which COLE, J., dissented very forcibly on the ground that a partnership signature binds but one individuality.⁴⁸ I am not at all sure that the dissenting opinion is not the better precedent.

As to joint confessions, it seems that the confession of one judgment debtor may supplement that of the other. Thus, in Pennsylvania, a judgment was entered against two defendants for a definite sum. Afterward, a *scil. fa.* to revive was issued, and both appeared and confessed judgment, with release of errors—one for the “sum due,” the other definitely. The court liquidated the first at the amount confessed by the second. It was held that the confession of the first left the

⁴⁴ Sheldon v. Stryker, 34 Barb., 120. ⁴⁷ North v. Mudge, 13 Iowa, 496.

⁴⁵ Neusbaum v. Keim, 24 N.Y., 325. ⁴⁸ Sherman v. Christy, 17 Iowa, 326.

⁴⁶ Gates v. Preston, 41 N.Y., 113.

liquidation in the discretion of the court, and the method pursued was legitimate. And although the definite confession was of a later date than the other, yet it was proper to consider the first interlocutory only, and to liquidate at the time the later confession was made, and thus constitute but one final judgment. Also, that the confession being the voluntary act of the defendants, it was not reversible on error, though the liquidation was within the corrective power of the lower court.⁴⁹

A confession of judgment in ejectment, it is held, must be treated on the same general principles which belong to solemn or judicial confessions in other cases. It is, therefore, a voluntary waiver of all defenses and rights, and is conclusive on the party forever. On this, the Pennsylvania court say: "The most important interests, not only property and liberty, but life itself, are habitually concluded, judicially, by solemn confession, made by the party in interest, in the face of a court of justice. And why should ejectment be an exception? In the nature of things, the interests involved in an ejectment suit are no more beyond the power of a party to control by his confession than any other rights of person or property. If he may confess his guilt in a capital case, he may surely confess his want of title in ejectment. And a judgment confessed concludes him and all his privies—and this not upon the effect of the statute, but by the general principles of the common law. It is a voluntary waiver of all defenses, and of all rights under the statute, or at common law—a total and unconditional surrender of the field of controversy, which concludes him forever."⁵⁰

SEC. 445. Defaults may be considered in a measure as tacit confessions of the right of a plaintiff to recover, leaving indeterminate, however, the amount of the recovery, where the action is to recover a debt, or damages. And in California it has been held, that where a summons was served on the defendant out of the proper township, but the record of the

⁴⁹ *Weikel v. Long*, 55 Pa. St., 238.

⁵⁰ *Secrist v. Zimmerman*, Id., 448.

justice recited service, and so established the personal jurisdiction *prima facie*, and the defendant made default, he could not afterward object to the jurisdiction, the judgment being conclusive when the objection was not taken at the time appointed for trial.⁵¹ The defendant, by default, voluntarily submitted the question of residence to the decision of the justice. And so, in regard to the possession and title to land, judgments by default are as conclusive as actual adjudications.⁵² However, in order that such a judgment, on any subject, may be a bar in a subsequent action, it is requisite that the cause of action should be the same strictly, and not merely arise out of the same agreement; as, for example, if, under an agreement for wages, an action is brought for the non-payment of the stipulated wages for November and December, the causes of action are not the same, and therefore, a default of the defendant in the first, will not preclude him from defending in the second suit.⁵³ And, inasmuch as a defendant is only held to admit by default that something is due the plaintiff, and not to admit that any particular amount is due, the judgment thereon is not conclusive in another suit as to the *application* of payments.⁵⁴ Yet, so far as it goes, a judgment by default is as conclusive as a judgment upon verdict.⁵⁵ A defendant, however, has a right, even after default taken—whether in an action of contract or tort—to participate in liquidating the amount of debt or damages, since this is still an open question, not covered by the admission of his default. And if he absents himself from the inquiry, he is as conclusively bound as if he had defended throughout,⁵⁶ although sometimes the cause may be appealed as to the inquiry, where this was not made by a jury.⁵⁷ But I think in general, where there is a complete default, it is left to the option of the plaintiff whether an assessment shall be made by the court or jury,

⁵¹ *Fogg v. Clements*, 16 Cal., 392.

⁵⁵ *Gifford v. Thom*, 1 Stock. Eq., 703.

⁵² *Maltonner v. Dimmick*, 4 Barb., 566.

⁵⁶ *Green v. Hamilton*, 16 Md., 329.

⁵³ *Van Alstyne v. R.R.*, 34 Barb., 30.

⁵⁷ *Mailhouse v. Inloes*, 18 Md., 333.

⁵⁴ *Sherwood v. Haight*, 26 Conn., 434.

and as to a mere matter of computation, it may be made by the clerk, under order of the court.

SEC. 446. We come now to determinations on questions of law raised by demurrer; the rule is that such judgments may be as effectual as a decision on the facts, provided the demurrer is not directed to formal defects, but involves the essential matters of the cause.⁵⁸ It must distinctly appear, however, that the judgment is on the merits, or the presumption will be that it is merely formal, and consequently no bar to another action.⁵⁹ A judgment on a demurrer to a good defense, is conclusive against the demurring party, when final in the cause, as to any subsequent suit on the same matters.⁶⁰ A mere special demurrer cannot have such an effect, because it does not go to the merits,⁶¹ and does not call for a decision that the claim is invalid, but only that the present form of action is not maintainable,⁶² and *e converso*.

The United States Supreme Court say: "Decided cases may be found, in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties, and that the admission, even if by way of demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury. From these suggestions and authorities two propositions may be deduced, each of which has more or less application to certain views of the case before the court.

"1. That a judgment rendered upon demurrer to the declaration, or to a material pleading setting forth the facts, is equally conclusive of the matters confessed by the demurrer, as a verdict finding the same facts would be, since the matters

⁵⁸ *Gray v. Gray*, 34 Ga., 502.

⁵⁹ *Estep v. Larsh*, 21 Ind., 197.

⁶⁰ *Wilson v. Ray*, 24 Ind., 159.

⁶¹ *Wells v. Moore*, 49 Mo., 229.

⁶² *Nicholson v. Ingram*, 24 Tex., 630

in controversy are established in the former case as well as in the latter by matter of record, and the rule is that facts thus established can never after be contested between the same parties or those in privity with them.

"2. That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless.

"[3.] Support to these propositions is found everywhere; but it is equally settled that if the plaintiff fails on demurrer in the first action from the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause as disclosed in the second declaration were not heard and decided in the first action."⁶³

It is a fundamental rule of pleading that a demurrer admits all the facts which are well pleaded; and these facts it is which are, therefore, rendered *res adjudicata* by judgment on a successful demurrer. Such a determination, though rendered on demurrer, reaches the merits of the cause,⁶⁴ and hence must be thereafter conclusive; as if there had been an issue on the facts which had passed into verdict and judgment;⁶⁵ that is, if the demurrer be general and not special, and therefore formal,⁶⁶ and the party instead of amending abides by the demurrer, and allows a final judgment to be entered thereon.⁶⁷

But a judgment merely that a declaration is bad in substance does not reach the merits so as to preclude a good

⁶³ *Gould v. R. R.*, 91 United States, 533, and cases cited.

⁶⁴ *Aurora City v. West*, 7 Wall., 99. ⁶⁶ *Goodrich v. Chicago*, 5 Wall., 573.

⁶⁵ *Clearwater v. Meredith*, 1 Wall., 43. ⁶⁷ *Bouchaud v. Dias*, 3 Denio, 244.

declaration for the same cause; as, for example, if the demurrer be for a non-joinder of a necessary party.⁶⁸ But where the judgment or demurrer determines the *whole* merit of the case, as where it involves the validity of the contract which gave rise to the claim, it is a bar to a subsequent suit.⁶⁹

SEC. 447. Where an action was brought against a married woman for legal services rendered, and the declaration was demurred to because it did not allege that the services were rendered on behalf of the separate estate of the defendant, and the demurrer was sustained, it was held that this result did not bar a subsequent suit wherein the declaration did set out this averment;⁷⁰ for a decision that the declaration is deficient is not, as above stated, a decision upon the merits of the cause;⁷¹ as, for example, that the declaration does not state facts enough to constitute a cause of action; and the rule is the same as to a bill in equity.⁷²

Where a suit was instituted against indorsers, and the plaintiffs had not averred any special diligence, or any act to fix the defendants' liability, a demurrer was sustained to it, but the court said: "This judgment, however, cannot be pleaded in bar of a good declaration for the same cause of action. Such a judgment is not on the merits within the meaning of the rule."⁷³

SEC. 448. But, on the other hand, if the declaration is a good one, the demurrer is to the merits. And the Georgia court states the rule thus: "The judgment of a court upon demurrer to the declaration is a final disposition of the case [where the party abides by it]. The demurrer admits all the allegations of the declaration to be true. The plaintiff can prove only the allegations which he sets out in his declaration. The demurrer, therefore, admits the whole case of the plaintiff, and makes the issue in law upon the case that, admitting it all to be just as he says, the law will not allow him to recover. A judgment rendered thereon by the court is just

⁶⁸ *Gilman v. Rives*, 10 Pet., 302.

⁷¹ *Stevens v. Dunbar*, 1 Blackf., 56.

⁶⁹ *Robinson v. Howard*, 5 Cal., 428.

⁷² *Birch v. Funk*, 2 Met., 544.

⁷⁰ *Terry v. Hammonds*, 47 Cal., 32.

⁷³ *Keater v. Hock*, 16 Iowa, 24.

as conclusive as a judgment rendered by the same court on facts found by the verdict of a jury. In the one case the jury finds the facts to be true; in the other the defendant admits them to be true; in either case the judgment of the court is the sentence of the law upon the facts. Was this order a judgment of the court upon the allegations made in plaintiff's declaration? It affirms that it was. It is, therefore, a judgment rendered on all the admitted facts, and concludes the plaintiff's case. We think, therefore, the charge right, if this case be the same as that which went off on demurrer in the former suit. The cases seem to be identical, and *res adjudicata* was well pleaded.”⁷⁴ Thus, where, on demurrer to a bill filed, the court determined that there was no equity in the bill, that there was an adequate remedy at law, that there was a former recovery which would bar the equity proceeding, and that the facts disclosed the bar of a statute of limitations, it was held to conclude any subsequent litigation thereon.⁷⁵

SEC. 449. When a demurrer, presenting two grounds is sustained, but the ground is not stated, the ground presumed will be that which would be fatal to the action. But where the one is merely fatal to the action, as, for instance, by reason of misjoinder, and the other involves the merits, or the right of the plaintiff to recover on his cause of action, then the presumption will be that the demurrer is sustained on the former ground,⁷⁶ leaving the merits still open to a better declaration.

SEC. 450. The principles herein relate as well to a demurrer sustained, in a former action, to a plea, as to a declaration. Thus, in an action of replevin, the defendants set up in bar a former judgment rendered against the plaintiff, in an action of trespass, relating to the same property, wherein the defendant pleaded a release, and the plaintiff unsuccessfully demurred to the plea of release, and the judgment was rendered for the defendant. This plea of the former judgment

⁷⁴ *Kimbro v. R. R.*, 56 Ga., 187.

⁷⁶ *Griffin v. Seymour*, 15 Iowa, 30.

⁷⁵ *Jordan v. Faircloth*, 34 Ga., 47.

was demurred to in the second action, and the plea was sustained. The court said: "It is objected by defendant's counsel that judgment in the trespass suit, as it appears by the plea, was rendered upon a demurrer, and not upon a verdict. Still the principle and effect of the judgment is the same. The same facts were involved and decided by the demurrer that could have been decided if the case had been submitted to a jury. It can make no difference whether the facts were proved by the release and witnesses, or were admitted by the pleadings."⁷⁷

⁷⁷ *Coffin v. Knott*, 2 Iowa, 584.

CHAPTER XXXI.

JUDGMENTS WITHOUT VERDICT— NONSUITS AND DISMISSALS.

Section 451. Nonsuit does not usually Bar.

- 452.** Stipulation for Non Pros.
- 453.** General Rule defined by Different Courts.
- 454.** Premature action.
- 455.** Dismissal of Bill in Chancery.
- 456.** When Dismissal Conclusive.
- 457.** Dismissal for want of Demand.
- 458.** Dismissal of Cross-Bill.
- 459.** Judgment in Blank.
- 460.** Bar by a Motion.

SECTION 451. As a general rule, a nonsuit is not apt to reach the merits of a cause, and, therefore, it is not, ordinarily, a bar to a subsequent action. But, usually, if a cause is submitted after a hearing, and pending a decision the plaintiff takes a nonsuit, he will thereby be debarred from suing again.¹ Yet if, even after a trial and appeal, and the reversal of the cause on appeal, he takes a voluntary nonsuit, he may bring another action—the reversal reinstating him in his right in this respect,² while in the other instance, just specified, the submission is necessarily on the merits, and if the plaintiff prevents a decision thereon, he will be held as fully concluded as if the decision had gone against him. In New York, it is held that a judgment of nonsuit in a mechanic's lien proceeding will bar a second action on the lien, although it will

¹ *Gillilan v. Spratt*, 8 Abb. Pr. (N. S.), 14.

² *Holland v. Hatch*, 15 Ohio St., 464.

not bar an enforcement of the debt. The lien is regarded as discharged.³ If, however, in an action there is a motion to dismiss pending, a plaintiff may obtain leave to discontinue, and thus save his right of renewing the action.⁴

If a judgment of nonsuit would be a bar in another state where it was originally rendered, it will have the same effect in the domestic tribunal, and the fact whether it would so bar in the state where the action was brought has been held to be a question of law and not a question of fact.⁵

SEC. 452. In the United States courts, it seems to be held that where parties agree in taking a case from the jury in order to submit it on the questions of law to the court on an agreed statement of facts, with a stipulation simply that the plaintiff shall be *non pros'd* if the facts stated are insufficient to support his action, the court thereon will order a nonsuit if the law is adverse to the plaintiff, but in so doing will declare it to be done with the agreement of the parties—which agreement will then save the adjudication from becoming a subsequent bar.⁶ And, in New York, where a cause was submitted, but with a reservation of leave to put in written points, which was not done, but the plaintiff withdrew the action on leave, it was held that the proceedings were not a bar—the action being by a landlord for possession.⁷ At first view, this would seem to be in antagonism with the case as to submission cited above from the same state. But the distinction seems to be that this was a qualified, the other an unreserved submission.

SEC. 453. The general rule in regard to nonsuits is well stated by the United States Supreme Court: "A judgment of nonsuit is only given after the appearance of the defendant, when from any delay, or other fault of the plaintiff, against the rules of law, in any subsequent stage of the cause, he has not followed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency, or mistake,

³*Sullivan v. Brewster*, 1 E.D. Smith, 686. ⁶*Homer v. Brown*, 20 How., 365.

⁴*Audubon v. Insurance Co.*, 27 N.Y., 221. ⁷*Carlisle v. McCall*, 1 Hilt., 403.

⁵*Bate v. Fellows*, 4 Bosw., 640.

he may be *non pros'd*, and is liable to pay the costs. But as nothing positive can be implied from the plaintiff's error, as to the subject-matter of his suit, he may re-assert it by the same remedy in another suit, if it be appropriate to his cause of action, or by any other which is so, if the first was not.⁸ Yet, notwithstanding the acknowledged right, it appears that in England a second suit after a nonsuit is regarded as so far vexatious that the court may stay proceedings therein until the costs of the first action have been actually paid by the plaintiff.⁹ A nonsuit, however, taken *after verdict* will bar, although not one taken or suffered before.¹⁰ And even if there is an agreement in a pending cause to abide by the decision or result of another similar suit, between other parties, it is held to be only a stipulation in the pending cause, and, carried into effect, will only have the legal consequence of a nonsuit, and hence be no bar to another action.¹¹ And so with an agreement on a submitted statement of fact that should the court be of the opinion that on the facts stated the action is not maintainable, the plaintiffs would become nonsuit. On this, the Maine court say: "The question submitted is whether that nonsuit and the judgment thereon constitute a bar to the present action. In common cases a nonsuit certainly is not a bar to another action for the same cause. Then, is the agreement anything more than a particular mode of finally disposing of that action without the form of a trial by jury? If the former cause had been opened to the jury, and the same facts had been proved which are contained in the statement before mentioned, and thereupon the presiding judge had ruled that the action was not maintainable, and, in submission to his opinion, the plaintiffs had become nonsuit, in such case it is clear the nonsuit would be no bar to the present action. How is the case altered because the nonsuit was entered in submission to the opinion of two or three judges [or of one]? It is true that in the former case there was a submission to the opinion after it was given or known, but in both cases the

⁸*Homer v. Brown, supra.*

¹⁰*Wright v. Wright, 2 Mass., 111.*

⁹*Bridge v. Sumner, 1 Pick., 371.*

¹¹*Ensign v. Bartholomew, 1 Met., 274.*

opinion submitted to was one founded on certain specified facts, and why should it be extended beyond those facts? Or, if a counsel, in drawing up a statement, omit certain important facts which were not then known to him, and perhaps not to his client, why should he lose the benefit of those facts when discovered? They may be such as would have changed the complexion of the cause, and led the court to a different decision.* Even where no new facts exist, why should a nonsuit be a bar, though entered pursuant to the agreement of the parties? A man must be very unwise to expect on a second trial that the court will decide against the opinion they have already delivered in the cause.† The hopelessness of such a proceeding will generally be a safeguard to a defendant, and besides he will recover costs against a plaintiff who will amuse himself in such imprudent and unprofitable experiments. It is true that the agreement which concludes the statement of facts in the reported case, and which is usually subjoined to similar statements, is very unequal, because a judgment on default is forever binding on the defendant, but a judgment on nonsuit is not so on the plaintiff; but this inequality is the consequence of a defendant's own contract, and it may easily be avoided by properly framing the agreement. Where a verdict is given for a plaintiff, the agreement may be that if the court should be of opinion that the action is not maintainable on the facts reported, the verdict shall be so amended as to stand [as] a verdict in favor of the defendant. And where the agreement is subjoined to a statement of facts, it may be that if the court should sustain the action on the facts agreed, a default shall be entered and a waiver on record of all right to commence another action for the same cause. We are all of opinion that the present action is not barred by the nonsuit judgment entered in the former one.”¹² Nor will the reason-

*This seems inconclusive on the point presented, for newly discovered evidence may be made available in securing a new trial often even where there has been a regular verdict and judgment thereon.

†But a party may better justify his position, and thus appeal from the court partially informed to the court well informed.

¹² *Knox v. Waldoborough*, 5 Greenl., 186.

ing and opinion of the court in any case have the force and effect of the thing adjudged, unless the subject-matter be definitely disposed of by a verdict, or decree.¹³ In Iowa, even a verdict does not bar without a judgment, and one may take a nonsuit after verdict and before judgment and retain his right to sue again. This, I think, is not the general rule, but a nonsuit must be taken before submission. Yet that court has gone so far as to say that if the verdict of the jury are in the words "no cause of action," and thereupon judgment is entered "that the plaintiff be nonsuited," the judgment is no bar.¹⁴

In Pennsylvania it has been held that where a writ of attachment is "abated and dismissed," and there is a formal judgment entered for the defendant for his costs, and also for a definite amount, on the failure of the plaintiff to appear, this judgment is merely for a nonsuit, and will not bar — whether rendered in a domestic tribunal, or that of another state. The court say in such a case: "But the court held that the Virginia suit was no bar to this action, because it terminated in a nonsuit, and was not an adjudication of the merits. The suit there was commenced by attachment, and the plaintiff failing to appear to his action, his writ was 'abated and dismissed,' and the court ordered that the defendant recover \$5 and his costs against the plaintiff. Very evidently, this was no more than a nonsuit, and by the statutes of Virginia it became at the end of the term at which it was rendered a final judgment — a circumstance which counsel supposes renders it a bar to the plaintiff's recovery in our courts upon the same cause of action. But it was final of what? Not of the merits of the controversy, because they were not adjudicated, but final of the defendant's right to have his costs of suit, and \$5 for the false clamor. This was all that was adjudicated, and this is all that that record concludes. It would not bar a subsequent action upon the note, either in Virginia or here; for a nonsuit, whatever the liabilities by which it is attended, can have such

¹³ *Fisk v. Parker*, 14 La. An., 492.

¹⁴ *Delany v. Reade*, 4 Iowa, 294.

effect nowhere. It is only where the merits have been passed upon, or from the course of pleadings and trial, they might have been passed upon, that a judgment sustains a plea of former recovery, and bars a subsequent suit.”¹⁵ And yet to me this case seems to wear a somewhat anomalous aspect.

In Illinois, it has been held that a plaintiff by failing to reply within the rule of court may be *non prossed* as to the special counts of his declaration, and yet be permitted to adduce the note or check under the common counts, and thus recover in the same action. The court say, however, in such a case, “if this had been a *non pros* of a part of an entire cause of action, we are not prepared to say that the result would not have been different as to that cause, especially if it was indivisible in its character.”¹⁶ The principle of the decision is that the *entire* cause of action was admissible under the common counts, notwithstanding the loss of the special counts.

Where an agreed statement of facts is allowed by the practice of the courts, as has been the case perhaps always in Massachusetts, and there is an agreement appended to such statement that (1) the court may enter nonsuit, if the opinion be against defendant in a title suit, or (2) enter default against the tenant, if otherwise, or (3) may refer with instructions to three commissioners, or (4) may make any other order or judgment in the case which the court may think it requires, and it appears that the judgment rendered could not have been entered under either of the first three clauses, it will be held that the court acted under the fourth clause, and that, therefore, the whole cause was submitted to the court on the facts stated, without limitation or restriction, and the judgment will be attended by the usual consequences of an unqualified submission of a cause.¹⁷

In Kentucky, where parties dismiss the suit “agreed,” the legal effect is to bar the original cause of action—this being merged in the judgment of the court thereon. And where

¹⁵ *Haws v. Tiernan*, 53 Pa. St., 194.

¹⁶ *Homes v. Austin*, 35 Ill., 413.

¹⁷ *Derby v. Jacques*, 1 Clifford C. C., 430.

parties thus dismissed a suit *agreed*, and accompanied this with an agreement to submit the cause to arbitrators, and the arbitrators met but could make no award, it was held that the original cause of action was merged, and no suit could be brought on it.¹⁸

Also, a judgment of nonsuit may involve a decision on the merits in such a way as to constitute a bar, as, for instance, if it is essentially a decision on the validity of a note in suit.¹⁹

In New York — in direct opposition to the Massachusetts doctrine above stated (*Ensign v. Bartholomew*) — if parties agree to stay a suit, or a series of suits, and abide by the result of another similar action pending, the judgment in the action thus referred to is conclusive, although the judgment is one as in case of nonsuit, and not tried on the merits, and so will bar the other suits as to the plaintiffs therein.²⁰ The court say in such a case: "Spear was defendant in the action referred to in the agreement, and he could in no way compel the plaintiff therein to bring his cause to a determination upon the merits, for he might, at any time, abandon the action. According to the agreement, the sufficiency of Spear's defense depended on the validity of the title of Brown, and if the plaintiff in that suit would not try his cause on the merits, the defendant therein could in no way compel him to do so. Curtiss had agreed to abide the result of that cause without requiring it to be determined on the merits. He may have supposed that it would be so tried and disposed of, but he did not make that a condition in his agreement with Brown. All he insisted upon was that judgment should be rendered in favor of Spear; in which event, no matter whether the judgment was by default or on the merits, he agreed to surrender possession, unless he chose to purchase the land of Brown." But, with all due deference, I think this cannot be maintained on principle. The essence of the agreement certainly was that the suspended suits should abide by the result of the test action; that is to say, should be ended as it ended.

¹⁸ *Jarboe v. Smith*, 10 B. Mon., 257. ²⁰ *Brown v. Sprague*, 5 Denio, 553.

¹⁹ *Brett v. Marsten*, 45 Me., 401.

But it terminated in a nonsuit. Therefore, in effect, the other suits terminated in nonsuits. And if a nonsuit does not bar, then all were left open as well as the test suit. And as to the defendant not being able to bring on a trial upon the merits, this is a remark that can be applied to all cases of voluntary nonsuit; but to what logical purpose, I do not perceive.

In New York, and doubtless everywhere, a nonsuit may be taken or suffered as well after evidence as before,²¹ and indeed, this is the usual period. And if a plaintiff applies for a nonsuit and this is refused by the court, and he declines to offer any evidence, so that the court considers only the counter-claim of the defendant, the plaintiff is not barred of another action on his demand, which he thus declines to submit to adjudication.²² And, in Indiana, where the court persisted in such a case, and entered a judgment against the defendant for costs, it was held, on appeal, that there could not properly be any judgment entered on any of the matters embraced in the plaintiff's complaint, and it therefore could not have the effect of a bar.²³

A *nolle prosequi* in a criminal case is no discharge, if entered in the earlier stages of a trial, and is held to be no bar to a new indictment, even if it precludes the government from suing out new process requiring the party to answer to the same indictment.²⁴

Unless service be made of process before return day, proceedings are *coram non judice* before a justice of the peace, and in such a case, if the defendant subsequently appears and insists on the cause being heard, and judgment be given for him by default of plaintiff, it is held, in Pennsylvania, to be only a judgment of nonsuit, notwithstanding the hearing of the cause.²⁵

²¹ *Coit v. Beard*, 33 Barb., 359.

²² *Jones v. Underwood*, 35 Barb., 211.

²³ *Miller v. Maus*, 28 Ind., 194.

²⁴ *Bacon v. Towne*, 4 Cush., 235, and cases cited.

²⁵ *Fisher v. Longnecker*, 8 Pa. St., 410.

Where there was a petition for partition of two parcels of land against a sole defendant, and on trial partition was awarded of one of them, but denied as to the other, and afterward commissioners were appointed and the cause continued from term to term, until finally the petitioners applied for leave to discontinue, and it was granted, the appellate court held that there had been a decision of the case, and the petitioners could not properly be allowed to discontinue at that stage of the proceedings, on the general principle that a discontinuance or nonsuit must come before a verdict or decision rendered, because to allow it afterward would give the plaintiff as many new trials as he pleased, without giving the defendant any opportunity to be heard on the question whether he should have them or not.²⁶ And on the same grounds, after a judge has heard the plaintiff's testimony, and decided the case on the merits, dismissing the complaint, he cannot destroy the effect of the decision by amending the judgment so as to give the plaintiff leave to bring another action.²⁷ But where an appeal from a justice of the peace is tried *de novo*, the Circuit Court may reverse a cause appealed "without prejudice," on motion of appellee, and against the remonstrance of appellant, and direct a *non pros.* below, which shall not be a subsequent bar. It is so, at least, in Maryland.²⁸

A *retraxit* constitutes a bar, because it goes farther than a mere nonsuit, and the plaintiff therein admits that he has no cause of action, and is held to his admission of record.²⁹ And it is on this ground, also, that in Kentucky and in Virginia dismissing a suit agreed is usually regarded as a finality.³⁰

SEC. 454. A premature action is no bar to an action brought after the cause matures; as, for example, where an obligee in a bond brought suit thereon before he had complied with the condition of the bond by producing before a

²⁶ *Larrabee v. Rideout*, 45 Me., 205.

²⁷ *Bostwick v. Abbott*, 40 Barb., 331.

²⁸ *Mining Co. v. Barry*, 19 Md., 429.

²⁹ *Coffman v. Brown*, 7 S. & M., 128; *Minor v. Bank*, 1 Pet., 74.

³⁰ *Hoover v. Mitchell*, 25 Gratt., 388.

referee the evidence upon which the referee was authorized to act, he was held not precluded from a subsequent action on fulfillment of the condition.³¹ So, if the cause of action has not accrued, or the plaintiff is under a temporary disability,³² or anything of the kind.

SEC. 455. The dismissal of a bill in chancery may be by the parties, or by the court; that is, voluntary or involuntary. And it may be on the merits, or on a technicality of some sort. Hence it may or may not be a subsequent bar. In the United States courts it is held that a decree dismissing a bill, if the decree is absolute in its terms, unless made on some merely technical ground, is a bar subsequently between the parties, and unless qualifying words, such as "without prejudice," accompany the decree, it will be presumed that the merits were adjudicated.³³ However, if, manifestly, the dismissal is for defect of pleadings, want of parties, a misconception of the form of proceeding, the want of jurisdiction, or any ground which does not involve an adjudication of the merits, there is no bar.³⁴ "Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proof, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed in the nature of a discontinuance or nonsuit, in an action at law, may be allowed to do so; but the uniform practice in most states is, to enter 'dismissed without prejudice.' So, when a decree against the plaintiff in equity proceeds on the ground that he has an adequate remedy at law, the course is to dismiss it without prejudice to an action at law." Yet, where a replication has been filed and proofs taken, and the cause is ready for hearing, but, in fact, there is no hearing, it has been held that it is "very difficult, and would be rather mischievous, to treat such conduct merely as a nonsuit at law."³⁵

Where two parties about to marry entered into a contract

³¹ *McFarlane v. Cushman*, 21 Wis., 404.

³² *Gray v. Dougherty*, 25 Cal., 272; *Quackenbush v. Ehle*, 5 Barb., 473.

³³ *Durant v. Essex Company*, 7 Wall., 107.

³⁴ *Hughes v. U. S.*, 4 Wall., 237.

³⁵ *Bigelow v. Winsor*, 1 Gray, 301.

on a consideration "understood between the parties," whereby the woman relinquished all claim upon the estate of her intended husband, and she was afterward left a widow, and the executors of the testator brought a bill in equity to enforce the contract and enjoin her from proceeding at law against the estate, which bill was dismissed with costs upon a finding that the consideration of the contract was that the husband should make her an adequate provision as his widow, which promise he had not fulfilled, and afterward the executors sued her at law for a breach of the contract in having proceeded at law against the estate, it was held that the dismissal of the bill by the court of equity was a conclusive bar against their action.³⁶

Where there are several defenses set up by an answer, and there is a general decree of dismissal of the bill, from which it is impossible to determine what was the ground of the decree, it will not be a bar if some of the defenses relate only to the maintenance of the action, even if others go to the merits of the controversy.³⁷

SEC. 456. Where a bill in equity to redeem land from a mortgage requires an answer under oath, and after the answer is filed the plaintiff moves to dismiss without the knowledge of the defendant, and prevails therein, after the expiration of the time for filing replication and taking testimony, the decree for the defendant is held to be conclusive on the merits, and will bar a subsequent action by the plaintiff or by a purchaser *pendente lite* for the same cause,³⁸ unless on the acquisition of a new title, which of course will allow another suit, the basis being different. Thus, a claimant brought a suit in equity against three defendants asking that a deed executed by one of them to another in trust for the third be canceled, and the third defendant in his answer denied that he claimed any interest in the land under the deed, and on the hearing

³⁶ *Blackinton v. Blackinton*, 113 Mass., 231

³⁷ *Foster v. Busteed*, 100 Mass., 412.

³⁸ *Borrowscale v. Tuttle*, 5 Allen, 377.

the bill was dismissed as to him, but sustained as to the other two, and afterward the complainant purchased the land at an execution sale under a judgment against the third defendant, who afterward sued him to recover possession of the land, it was held that the dismissal of the bill was not conclusive in this suit, but the defendant (former plaintiff) could set up the title he had derived under the sheriff's deed.³⁹ And so where a grantor of land in parcels, with warranty, brings suit to avoid a deed which clouds his title, against two defendants, and one is found to be a fraudulent grantee, but the bill is dismissed as to the other on the ground that the title had passed to him as an innocent purchaser, and afterward he reconveys to the other against whom the decree had been rendered, the plaintiff may file a supplemental bill showing the reconveyance, and thereunder avail himself of the former decree.⁴⁰

SEC. 457. If an action is dismissed for want of a proper demand before its commencement, the dismissal is no bar to a subsequent action brought after a new demand in legal form has been made.⁴¹ And so of an informality in a replevin bond; a new bond may be given and a second action brought,⁴² even if the property has been returned, or if it has been taken by the plaintiff to the place where he took it from, and the defendant has not taken out a writ of return, nor actually received the property under the judgment in the first action.⁴³ And so, if the writ of replevin is quashed for want of a sufficient affidavit, and thereon the plaintiff dismisses the cause, the question of title is not settled by this result.⁴⁴

SEC. 458. The dismissal of a cross-bill, on a hearing of the merits of an equity suit, has the same conclusive effect as to the matters therein embraced as the dismissal of an original bill.⁴⁵

SEC. 459. Where a judgment is recovered by default, but

³⁹ *Hamm v. Arnold*, 23 Cal., 373.

⁴³ *Walbridge v. Shaw*, 7 Cush., 560.

⁴⁰ *Ely v. Wilcox*, 26 Wis., 91.

⁴⁴ *Stockwell v. Byrne*, 22 Ind., 6.

⁴¹ *Crosby v. Baker*, 6 Allen, 295.

⁴⁵ *Walker v. Byer*, 19 Ark., 327.

⁴² *Morton v. Sweetser*, 12 Allen, 135.

no certain sum is assessed therein as recovered, blank spaces being left where the sums should be inserted, it has been held that, nevertheless, it may be set up in bar of a second suit. The defect might be corrected as to the amount by application to the court where the judgment was rendered, and, on refusal, by application to the appellate court, but even in its blank form it may be regarded as conclusive as to the matters embraced in it except as to the amount not stated.⁴⁶ But a judgment which is ineffectual because of a mistake in the name of a plaintiff [or defendant] will not bar another suit on the original demand; for it is only a valid judgment that merges the cause of action.⁴⁷

SEC. 460. It is held that a motion to set aside a judgment being overruled, the result will bar a repetition of the same motion.⁴⁸

⁴⁶ *Wells v. Dench*, 1 Mass., 232.

⁴⁸ *Grier v. Jones*, 54 Ga., 154.

⁴⁷ *Wixem v. Stevens*, 17 Mich., 519.

CHAPTER XXXII.

EQUITABLE MATTERS — AWARDS.

Section 461. Set-offs in Equity.

462. Legal and Equitable Defenses.

463. Legal and Equitable Courts in one.

464. References and Awards.

SECTION 461. A court of equity can reach and compel a set-off, when a court of common law could not do so; as, for example, where the record parties are not the same in two judgments, and there is an interposition of a trustee; and so, a court of equity will not permit *cestuis que trusts* who are insolvent to enforce and collect, through their trustee, a judgment against parties who have just claims against them which they cannot make available if a set-off is refused.¹ And in such a case the inability of a court of common law will not disable equity from performing its peculiar functions, although the mere existence of cross-demands will not justify chancery in enforcing a set-off. There must be some peculiar equitable circumstances to warrant the interference.² But where these really exist, “the objection that the proceedings may become too complex by permitting different questions at law and in equity to be settled in one suit, though founded in much plausibility and some truth, is not sufficiently strong to overcome the plain provisions of a statute, and the substantial dictates of justice. For, whatever may be the views of jurists and lawyers, the plain, practical truth is this: that every man of good business sense would much prefer setting off his claim against that of another,

¹ *Hobbs v. Duff*, 23 Cal., 627.

² *Naglee v. Palmer*, 7 Cal., 543.

rather than first pay the money out of his own pocket, and then risk getting it again out of the pocket of his adversary. Insolvency may exist in a thousand cases where its existence cannot be shown at the time, and may often occur in the future before the party could possibly recover in his cross-action. Parties were often ruined by the practical operation of the old rule, which seems to have been founded more in the convenience of courts than upon the true principles of justice. Like the practice of a justice of the peace who never heard any testimony except for the plaintiff, upon the alleged ground that the contrary course of hearing the testimony on both sides tended to produce doubt and confusion in his own mind, the former may have been more simple, but still it was all on one side, and practically defeated the very ends contemplated by the law itself.”³ Such is the California rule, and that of all other states which assimilate law and equity by abolishing the ordinary distinctions, and especially which have provided by statute for the matter of equitable defenses in legal matters. And a court of equity will thus compel an equitable set-off, on proper application, where it is impossible to make it available in an ordinary suit at law or equity;⁴ as, if there is proof of actual insolvency, or of danger of losing the demand; although it is not enough to show large indebtedness and heavy incumbrances of property.⁵

SEC. 462. Where a party holding the *legal* title to real estate, under a patent from the government, brought suit to recover possession thereof against a defendant, who set up as a defense an impeachment of the patent, and the court decided against the defendant on the ground that this defense was not a legal but an equitable one, it was held that the defendant was not debarred from bringing a subsequent action in chancery to set aside the patent on the ground of fraud — the former adjudication not embracing, but excluding, the consideration of this question.⁶

³ *Walker v. Sedgwick*, 8 Cal., 405.

⁴ *Russell v. Conway*, 11 Cal., 93.

⁵ *Howard v. Shores*, 20 Cal., 277.

⁶ *Arnold v. Grimes*, 2 Iowa, 1; *Thomas v. Hite*, 5 B. Mon., 593.

SEC. 463. Where a court is both legal and equitable, the conclusive effect of a former decision cannot be obviated by shifting from one side of the court to the other. And so, where a bill was filed for a new trial in an action of ejectment, on the ground that the witness who had testified as to adverse possession in the case had since refreshed his recollection, and would then testify that he was mistaken before, and the bill was dismissed for want of equity, it was held the court would not afterward entertain a motion for a new trial addressed to the law side of the court, the matter being *res adjudicata* by the decree dismissing the bill.⁷

SEC. 464. As to references, or awards, a judgment rendered thereon has the same binding effect as regular judgments upon verdicts of juries have. Thus, as to a report of referees, the Maine court say: "A judgment upon a report of referees who adjudicated matters legally submitted to their determination, is equally valid as when founded upon a verdict of a jury. By the contract of submission in the case at bar, the defendant was bound to make a perfect title to the plaintiff in the estate referred to therein. The referees were empowered by the parties in that contract to determine whether that title was made perfect. After this should be shown to their satisfaction, they were authorized by the submission to consider and adjudicate upon other matters between the parties. *

* * * * The judgment was rendered upon a report when all matters submitted were heard and determined by the evidence which the parties chose to introduce. *

* * The judgment is conclusive as long as it remains."⁸ And so an award of arbitrators and judgment thereon,⁹ provided, of course, that it is final.¹⁰

⁷ *Baldwin v. McCrea*, 38 Ga., 650.

⁸ *Pease v. Whitten*, 31 Me., 118-120, *passim*.

⁹ *Lloyd v. Barr*, 11 Pa., 49.

¹⁰ *Darlington v. Gray*, 5 Whart., 496.

CHAPTER XXXIII.

IMPEACHMENT OF DOMESTIC JUDGMENTS FOR MISTAKE OR FRAUD.

Section 465. Mistakes in Judgments.

- 466. Same in Torts.
- 467. Same in Appointment of Commissioners.
- 468. Fraud must be Clearly Proved.
- 469. Must be a Fraud in obtaining the Judgment.
- 470. Exception in Criminal Case.
- 471. Impeachment by strangers for Fraud.
- 472. Example in Partition Case.
- 473. Impeachment by Judgment Creditors.
- 474. Limitation on the Rights of such Creditors herein.

SECTION 465. A mistake in a judgment which does not actually invalidate it, is no avoidance of a bar, as, for example, if one recovers judgment on a promissory note bearing interest, he cannot again sue upon the same cause of action on the ground that there was a mistake made in assessing the amount, nor even bring a supplementary action for the interest left out; as, if the interest was only calculated from the maturity of the note, and a second action is brought for the interest which had accrued from the date to the maturity, the second suit cannot be maintained.¹ Yet, it seems the rule does not apply where a claim is allowed against a county for too large an amount in favor of a county collector—the claim being allowed by the county court. The excess may be collected back by suit—the judges being regarded merely as the fiscal agents of the county, so that their mistake could be inquired

¹ *Wickersham v. Wheedon*, 33 Mo., 563.

into and corrected as well as those of an individual acting in his own behalf.² But where in an ordinary suit an error is found involved in the judgment, it is to be corrected usually by proceedings in review, and not by a new action for the same cause.³ In Indiana it is held that where suit is brought on an *official bond* for money not paid over, and a judgment is obtained for several sums collected and retained, but by mistake in taking judgment some of such collections are not included, these can be sued for afterward.⁴

SEC. 466. Where a person had his house and furniture burned through the carelessness of the agents of a railroad company, it was held he might recover the entire value, notwithstanding the property was insured and the insurance money was paid to him; this, however, giving the insurance company an equitable claim to be reimbursed by him on a recovery from the railroad company. But it was held further that if, by mistake, he should deduct the amount he had received from the insurance company, the judgment would be final against him, and the loss would be his own. He could not rectify the mistake by another action,⁵ except, perhaps, in the way of a review.

SEC. 467. Where, under an order to lay out ditches, the court appointed five commissioners, instead of three, and judgment was rendered thereon, a plaintiff subsequently maintained that it could be impeached in another proceeding in the same court, (1) because the appointment was without warrant, or authority of law, and (2) because the order on which the appointment was based was the result of an *ex parte* proceeding. But the court held the position was not tenable, and the only course available was by a direct application to the court itself for the correction to be made.⁶

SEC. 468. In all cases where a judgment can be impeached for fraud, the fraud must be clearly established: It will never be inferred, and the presumption of correctness in the pro-

² *County v. Phillips*, 45 Mo., 75.

⁵ *Weber v. R. R.*, 36 N. J., 213.

³ *Coburn v. Woodworth*, 31 Barb., 384.

⁶ *Wood v. Wilson*, 4 Houst., 95.

⁴ *Birket v. State*, 3 Ind., 248.

ceedings of a court having jurisdiction of the parties and cause must be overcome by distinct proofs of the contrary, or it will prevail. It is not enough to raise a suspicion, or a probability, or even to show the presence of a motive for fraud.⁷

SEC. 469. Moreover, the fraud must be a fraud in *obtaining* the judgment—a fraud on the court, and not merely a previous fraud by one party on the other, that is, a fraud in the cause of action itself—for this is set at rest by the trial unless reversed by a direct proceeding by the party against whom the judgment is rendered. It is even held that a *party* cannot be allowed to show in another suit that a former decree against him was obtained by false and forged evidence, since this collaterally impeaches the decree by not only showing it to be wrongfully obtained, but to be wrong in itself.⁸ A collateral impeachment is allowed to strangers, because they have no privilege of direct appeal; for “fraud is a matter of fact, and if used in obtaining judgment, is a deceit on the court, and hurtful to strangers, who, as they could not come in to reverse or set aside the judgment, must, of necessity, be admitted to aver it was fraudulent. But who ever knew a *defendant* plead that a judgment obtained against him was fraudulent.”⁹

The celebrated *Duchess of Kingston's Case* (20 Howell's State Trials, 355), is a case in point. She was indicted for bigamy, and set up in defense a former decree of divorce by the ecclesiastical court, rendered before her marriage with the Duke of Kingston. On this, it was held that the decree was conclusive as between the parties, but not in a suit between different parties; so that the crown could be allowed to avoid the effect of the decree by showing that it was obtained by the collusion of both parties, and thus was a fraud upon the court. This was done, accordingly, and the Duchess was convicted on the evidence adduced.

⁷ *More v. Parker*, 25 Iowa, 362.

⁸ *Peck v. Woodbridge*, 3 Day, 36.

⁹ *Purdam v. Phillip's Harg. Law Tracts*, 456 note cited in *Greene v. Greene*, 2 Gray, 365.

It is, then, wholly incompetent for a party to set up that the evidence was improperly obtained on which a judgment is founded, in any collateral way. If the party fails to have the judgment reversed by regular appeal, or by having it set aside on application to the court where it was rendered, he will be held to acquiesce in it, and, therefore, to be concluded by it.¹⁰ Nor can he allege that a judgment against his co-defendant was rendered upon a pretended cause of action which never justly subsisted and was fraudulently procured.^{11 *}

SEC. 470. But there seems to be an exception to this in the case of a public prosecution where a prisoner sets up a former conviction in bar. It is held that the people may show that it was procured by the prisoner himself, in covin and fraud, with the design of shielding himself therewith. In a case of this kind the court said: "The magistrate was deceived, the public rights injured, and the defendant was the perpetrator of the offense. To declare that this was not a fraud, and that under its cover the author of it should be shielded from the present indictment would, in our opinion, be a libel upon the administration of justice. * * *

* * * An offender can possess no implied authority to conduct a prosecution against himself. * * * * Nothing is less probable than that a person would be selected to inflict punishment on himself, or to enforce that justice which all his interests and feelings were enlisted to defeat. But in this case, the offender did virtually conduct the first prosecution. His design in it was to shield himself from adequate punishment, and he so managed the proceedings as to effect that design. On these facts and intents, then, we are satisfied that the judgment of the law must be that the conviction was obtained by covin and fraud. The verdict cannot be set aside."¹²

* And so in an action upon a judgment, it cannot be set up as a defense that the judgment was obtained by the false testimony of the plaintiff, on the trial of the cause in which it was rendered, the defendant being present. *Cottle v. Cole*, 20 Iowa, 481.

¹⁰ *Kelley v. Mize*, 3 Sneed, 61.

¹² *State v. Little*, 1 N. H., 258.

¹¹ *Smith v. Smith*, 22 Iowa, 518.

SEC. 471. A stranger can impeach for fraud a judgment obtained in another court, as well as in the one in which the second action is pending. Thus, in an action of ejectment, the defendant set up a judgment against one under whom both parties claimed title, rendered in a suit in which this defendant was plaintiff, and on which the land in dispute was sold to him by the sheriff. The plaintiff in the pending action offered to prove that the judgment was fraudulently obtained. But the court instructed the jury that the validity of a judgment of another court could not thus be inquired into collaterally. On appeal, this was held to be error.¹³ The title of an innocent purchaser, however, under a decree to set aside a deed, cannot be affected by fraud or collusion in obtaining such decree, he not being a party.¹⁴

SEC. 472. Where proceedings were had in partition, wherein it appeared in evidence that a sale and conveyance had been made by the administrator to the husband of one of the heirs, of the wife's share of the land, the wife was allowed to show that this was but an agreed method to divide the land, that the husband paid no money, and that he had taken her share thus to hold in trust for her. It was held also that a fraudulent design to sell her share thus held by the husband, in pursuance of which design he confessed a judgment for the purpose of destroying the wife's claim by means of a sheriff's sale under it, might be shown by her against the purchaser at the sale, having notice of the title of the wife and of the fraud practised against it by the husband. And also, as she could not question the validity of the judgment so confessed by the husband in fraud of her rights on a *scire facias* against her as administratrix—it being valid as between the parties—she could aver the fraud in an action of title on the judgment brought against her in her own right. The court said: "In the eye of the law fraud spoils everything it touches. The broad seal of the commonwealth is crumbled into dust as against the interest designed to be defrauded. Every transaction of life between individuals, in which it mingles, is cor-

¹³ *Hall v. Hamlin*, 2 Watts, 354.

¹⁴ *Jones v. Talbott*, 9 Mo., 121.

rupted by its contagion. Why, then, should it find shelter in the decrees of courts? *There* is the last place on earth where it ought to find refuge. But it is not protected by record, judgment or decree; whenever and wherever it is detected its disguises fall from around it, and the lurking spirit of mischief, as if touched by the spear of Ithuriel, stands exposed to the rebuke and condemnation of the law. The learned counsel, however, contended that the record is fair and regular. It is true that on the face of the record there is no evidence of covin or deceit, but it is without the record that the evidence is alleged to exist. It was not alleged by the defendant that there was any evidence of infirmity on the record or decree, which would render it null and void. The offer was of proof of facts and circumstances without the record, to show that the most startling fraud would be consummated by giving effect to the decree in its literal import, that by giving full effect to it as evidence of absolute title, the whole purpose, design, and understanding of the innocent parties to it would be subverted. * * * * * True, there is nothing on the paper which is foul; it is the attempt to wrest them from their original purpose and effect which constitutes the fraud. He was the legal protector of his wife, and she suspected no guile in him; he was her guardian, and she confided in him; he was her husband, and she trusted him; and now this trust and confidence is to be her ruin, and she not allowed to prove the truth of the transaction, and the deceitful pretenses and contrivances on his part, by means whereof this fatal decree was procured. The decree is fair on its face, as the learned counsel contend, but when were fraud and covin otherwise? A forged record might be all fair, and smooth, and comely on its face, yet the sanctity due to an honest record would not protect it from exposure by proving the truth. But a forged record would not be more subversive of the truth and justice of a case than that of one procured by falsehood and deceit. The dark side of the picture in this case is perceived only when the husband, and after him the plaintiff below, lifted the veil and disclosed the sole object and

purpose which they intended to accomplish, so variant from the truth and justice of the case, and subversive of the rights of the confiding wife. But there is a balm in Gilead. The law will not tolerate the consummation of the scheme.”¹⁵ It is much to be hoped that this generous and enthusiastic burst of just and eloquent indignation proved a wholesome lesson to the plotting villains of the ring.

SEC. 473. Judgment creditors, as well as defrauded wives, may attack collaterally such judgments as are obtained by fraud and collusion to injure their interests; as, also, sureties¹⁶ and bail.¹⁷ Says the New Hampshire court: “There is no doubt that a judgment may be collaterally impeached by a third person, not party or privy to it, upon the ground that it was obtained by collusion with intent to defraud him. A familiar illustration is to be found in judgments entered up by the parties for the purpose of defrauding creditors, and the books are full of cases where the plaintiff in a suit against an executor who has pleaded a judgment against him on a specialty, and no assets beyond, has been allowed to avoid the judgment by replying that it was obtained by the fraud and covin of the defendant. So, if a judgment be rendered by fraud and covin between the parties, to defeat the title of a third person, the latter may plead the matter in avoidance of the judgment.”¹⁸

SEC. 474. But there is a limitation on the right, namely, the fraud must be against *them*; not merely against the *debtor*. On this the Pennsylvania court say: “The objection to the judgment is unfounded; not because the matter had been twice examined, but because it is not pretended that the judgment was *collusive*. The application of the administratrix was to *open* it on the ground that the intestate had been *overreached*; and the application of the creditors to *vacate* it was founded on no principle whatever. With the application

¹⁵ *Mitchell v. Kintzer*, 5 Pa. St., 217-220, *passim*.

¹⁶ *Berger v. Williams*, 4 McLean C. C., 577.

¹⁷ *Parkhurst v. Sumner*, 23 Vt., 538.

¹⁸ *Manuf. Co. v. Worster*, 45 N. H., 111.

of the administratrix the creditors had nothing to do; but if the judgment were collusive, they might abate it collaterally; and though they have been sometimes allowed to intervene directly, such a practice is irregular. Where a collusive judgment comes into collision with their interests, they may avoid the effect of it by showing it to be a nullity as to themselves, and in doing so they do not impair its obligation between the original parties, upon whom it is undoubtedly binding; a fraudulent judgment, like a fraudulent deed, being good against all but the interests intended to be defrauded by it. But they cannot call upon the court to vacate it on the record, which would annul it as to the whole world. It is contended, however, that the judgment is fraudulent because he who confessed it was defrauded. A surreptitious judgment, however, is fraudulent only as to the immediate parties, not by the 13 Eliz. against creditors, who certainly cannot go behind it to try over again a defense which their debtor had made, or was competent to make.”¹⁹ That is to say, creditors can only attack collaterally for collusion, and not for any original or subsequent matter of defense; so that “a judgment creditor objecting to a prior judgment on the ground of a want of consideration can only do so on an issue directed as to the prior judgment to ascertain the amount due on it. While it remains a record debt, unabated by satisfaction, in whole or in part, and unaffected by any such proceeding as the issue of amount, neither the sheriff nor a subsequent judgment creditor can resist its effect as a lien, nor can the sheriff disregard its claims, as such, in appropriating the proceeds of the sale of real estate on which its lien rests.”²⁰

¹⁹ *Dougherty's Estate*, 9 W. & S., 196.

²⁰ *Lewis v. Rogers*, 16 Pa., 21.

CHAPTER XXXIV.

IMPEACHMENT OF DOMESTIC JUDGMENTS FOR WANT OF JURISDICTION.

Section 475. Superior and Inferior Courts—Presumption.

- 476. Presumptions alike as to Regularity merely.
- 477. Special Statutory Jurisdiction.
- 478. Qualification of Rule as to want of Jurisdiction.
- 479. Gross Error does not destroy Conclusiveness.
- 480. Special Jurisdiction of Superior Courts—Rule.
- 481. When no Appeal provided for as to Limited Tribunals.
- 482. Probate Courts.
- 483. Tax Assessments.
- 484. Illinois Rule.
- 485. Recitals.
- 486. Judgment by Warrant of Attorney—Attorneys at Law.
- 487. Filing of Warrant to Confess Judgment.

SECTION 475. Herein there is a broad distinction to be made between courts of superior or general jurisdiction, and inferior or limited and special jurisdiction, as to the presumption of jurisdiction, and consequently as to the degree of evidence requisite to be adduced in impeaching them, respectively. The rule is succinctly stated by the Illinois court: "That in relation to superior courts, or courts of general jurisdiction, nothing is to be presumed to be out of their jurisdiction but that which specially appears to be so; but, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is specially alleged." Yet in the same case the court held that the presumption as to superior courts may be rebutted by the *silence*

of a judgment or decree as to service, and the accompanying fact that the summons shows a want of or insufficient service, since the question of service is primary, and must be determined before proceeding to adjudicate; although service also will be presumed in all collateral proceedings until the presumption is set aside by circumstantial or positive proofs.¹ However, in general, unless the record, at least in a degree, shows a want of jurisdiction, jurisdictional facts, such as service of the writ, etc., are conclusively presumed in favor of a superior court, although if, in any way, the want of jurisdiction appears on the face of the record, the proceedings are a nullity. The rule may, and doubtless does, work occasional individual hardships, but the public good is held to require an absolute fixity of rule in this particular; and sometimes, as we shall see in a following chapter, relief may be had from the hardship of the rule by application to a court of chancery.² But as to a court of inferior or limited powers, the jurisdictional facts must be set out on the face of the proceedings, or the want of jurisdiction will be conclusively presumed against it.³

SEC. 476. Yet there is no difference between superior and inferior courts as to the conclusiveness of their judgments, except only as to the presumption of jurisdiction. Either acting within jurisdiction, and this appearing in the case of inferior courts, the acts will be binding upon the parties when final, and for all purposes and all time. On the other hand, where it is manifest that a superior court has exceeded its jurisdiction, its decisions are void of effect and binding power.

The whole rule is well stated by the Maryland court: "It is a well settled principle that the judgment of a court of competent jurisdiction, when coming incidentally in question, is conclusive upon the question decided, and cannot be impeached on the ground of informality in the proceedings, or error, or mistake of the court in the matter on which they have adjudicated. It is also equally well settled that a judgment manifestly rendered without jurisdiction will be void,

¹ *Swearengen v. Gulick*, 67 Ill., 212. ³ *VanDoren v. Horton*, 1 Dutch., 208.

² *Coit v. Haven*, 30 Conn., 197.

whether the tribunal which pronounces it be an inferior court of limited and special jurisdiction, or a superior court of record, proceeding according to the course of the common law—the distinction being that with regard to the former the jurisdiction cannot be presumed, but must be shown affirmatively, on the face of the proceedings; while with reference to the latter, when called collaterally in question, every intendment and presumption is made in their support, and the judgment is conclusive unless it manifestly appear upon the record * that the court acted without jurisdiction. But if the record shows that the court has proceeded to render judgment *in personam*, without having jurisdiction over the cause and over the parties, such judgment is void, and cannot be enforced.”⁴ And so, if, upon an inspection of the record, a judgment, by whatever court rendered, and by whatever means questioned, appears to have been rendered without legal notice to the defendant, it is absolutely void. Yet, “if the record of a judgment of a domestic court of general jurisdiction declares such notice to have been given, such declaration cannot be contradicted by plea and proof; because, for reasons of public policy, the records of such courts are conclusively presumed to speak the truth, and can be tried only by inspection. The records of courts of limited jurisdiction and of foreign courts may sometimes be contradicted by plea and proof, when the purpose is to show want of jurisdiction; but the records of domestic courts of general jurisdiction cannot be thus contradicted; it can only be done when proceedings are instituted for the express purpose of setting them aside. But the records of all courts are liable to be impeached, if it can be done by inspection alone, and if such inspection discloses want of jurisdiction over the person of the defendant, the judgment as against him will be void for every purpose.”⁵ In 1 Smith’s Leading Cases (5th American ed.), 834, the matter is thus summed up: “While domestic judgments are tried, in some

*The doctrine of Illinois, as above noted, is somewhat exceptional on this point.

⁴Clark v. Bryan, 16 Md., 176.

⁵R. R. v. Weeks, 52 Me., 458,

particulars, by a severer test than those of foreign tribunals, they are protected in others by stronger barriers; and an averment of notice, or appearance on the record, cannot be contradicted by extraneous evidence; but the judgment is sustained under these circumstances not because a judgment rendered without notice is good, but because the law will not permit any proof to weigh against that which its policy treats as absolute verity, and remits the injured party to his remedy against those by whom the record has been falsified. When, however, the record itself shows expressly, or by a necessary implication, that a foreign or domestic, a superior or inferior tribunal has proceeded without notice, and without any sufficient reason or excuse for the want of notice, no further presumption can be made in its favor, and it may be impeached and set aside collaterally, as well as in the course of regular proceedings in error." More care is requisite, however, in judgments rendered by default than in those which are contested, although the final principle is the same in both. Says the United States Supreme Court thereon: "In reviewing the decision of the Circuit Court, it should be borne in mind that the judgment impugned before that court was a judgment by default, and that in all judgments by default, whatever may affect their competency or regularity, every proceeding indeed, from the writ and indorsements thereon down to the judgment itself, inclusive, is part of the record, and is open to examination, and that such cases differ essentially in this respect from those in which there is an appearance and a *contestatio litis*, in which the parties have elected the ground on which they choose to place the controversy, expressly or impliedly waiving all others. * * * * It would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment or any proceeding conducing thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent on him to fulfill. The court entering such judgment by default could have no jurisdiction over the person to render such personal judgment,

unless by summons or other process the person was legally before it. A court may be authorized to exert its powers in reference either to persons or things, may have jurisdiction either *in personam* or *in rem*, and the existence of that jurisdiction, as well as the modes of its exercise, may vary materially in reference to the subject-matter to which it attaches. Nay, they may be wholly inconsistent, or, at any rate, so much so as not to be blended or confounded. This distinction has been recognized in a variety of decisions in which it has been settled that a judgment depending upon proceedings *in personam* can have no force as to one on whom there has been no service, actual or constructive, who has had no day in court and no notice of any proceeding against him, and that, with respect to such a person, such a judgment is absolutely void; he is no party to it, and can no more be regarded as a party than can any and every other member of the community.”⁶

SEC. 477. As to *special statutory powers*, conferred on a court of general jurisdiction, not exercised according to the course of the common law, such a court stands on the same footing as an inferior court — the presumption is against it, and its jurisdiction must appear. And this principle is applied to the United States District Courts in relation to bankruptcy jurisdiction, which is regarded as falling within the class of special and summary powers, so that the jurisdiction therein must appear or be distinctly shown, and even then it may be denied and impeached.⁷ The same prevails in process of garnishment, or trustee process as it is called in the New England states, against an absent debtor; because the entire authority of the court is dependent upon the existence within the state of a subject-matter on which its jurisdiction can be exercised.⁸

SEC. 478. The rule, however, that a want of jurisdiction in a superior court must appear from the record in order to justify a collateral attack, must be subject to some qualifica-

⁶ *Harris v. Hardaman*, 14 How., 338.

⁷ *Morse v. Presby*, 5 Fost., 301, 305.

⁸ *Carleton v. Insurance Co.*, 35 N. H., 166.

tion, and may be stated too broadly. The California court very forcibly say: "Pushed to its logical results, this doctrine, without some qualification, becomes equivalent to a rule that the judgment of a court of superior jurisdiction cannot be attacked at all in a collateral action, notwithstanding a want of jurisdiction may appear upon the face of the record; which differs materially from the rule as stated by us at the threshold. At least, it is equivalent to saying that no judgment can be attacked collaterally unless the record shows affirmatively upon its face that this or that was not done, or that no service of summons was had upon the defendant—language which we venture to say has never yet been found in any record. What do the cases mean when they speak of a want of jurisdiction appearing upon the face of the record? Do they mean a positive and direct statement to the effect that something which must have been done in order to give the court jurisdiction was not done? Or do they mean that a want of jurisdiction appears whenever what is done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction? If the former, they are a delusion, and the respondents and others in like circumstances may well characterize them as cases

'That palter with us in a double sense,
That keep the word of promise to our ear,
And break it to our hope.'

For we venture to say that no case can be found, or will arise hereafter, where the conditions contemplated by such a rule will be found to exist. No court has ever yet so far stultified itself as to render a judgment against a defendant, and at the same time deliberately state that it had not acquired jurisdiction over his person. Suppose, in a case of attempted personal service, the officer should return that he had served the summons on A B, the son of the defendant, by delivering to him personally a copy, and also a copy of the complaint, and the remainder of the record is silent upon the question of service. Could we presume, in the face of such a record, that he served it on the defendant also? Undoubtedly not. There

would be a want of jurisdiction upon the face of the record, within the rule in hand, and the judgment would be declared a nullity whenever and wherever presented in support of a legal claim or right. We consider the true rule to be that legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done; but when the record states what was done, it will not be presumed that something different was done. If the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defendant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three. * * In determining the question whether a want of jurisdiction is apparent upon the face of the record, we must look to the whole of it, and report the responses of all its parts.”⁹

SEC. 479. It is not enough that the record shows irregularity, or gross error. The defect must involve jurisdiction.¹⁰

SEC. 480. The New York Supreme Court thus states the rules relating to special jurisdiction of superior courts:

“1. Where the judicial tribunal has general jurisdiction of the subject-matter of the controversy or investigation, and the special facts which give it the right to act in a particular case are averred, and not controverted, upon notice to all proper parties, jurisdiction is acquired, and cannot be assailed in any collateral proceeding.

“2. Where the judicial tribunal has not general jurisdiction of the subject-matter, under any circumstances, no averment can supply the defect, no amount of proof can alter the case, no consent can confer jurisdiction.

“3. Where the judicial tribunal has not *general* jurisdiction of the subject-matter, but may exercise it under a particular state of facts, those facts must be specially averred and

⁹ *Hahn v. Kelley*, 23 Cal., 406.

¹⁰ *Falkner v. Guild*, 10 Wis., 472.

established, and when so established on a hearing of all proper parties, cannot be impeached in any collateral proceeding.”¹¹

Against the last rule, however, the Wisconsin court has entered a passing caveat or protest, maintaining that there is no well founded distinction between proceedings under a special statute, and under its ordinary common law powers, by a court of general jurisdiction, on the ground that the “presumption in favor of the regularity of the proceeding of such courts, is founded on the character of the court itself. And that character is the same, whether it act under a special statute, or under the common law.” Most certainly true; but has not the learned court inadvertently confounded things here which ought to be kept distinct, namely, the acquiring of jurisdiction and the regularity of proceedings afterward? When it is shown that any court, of even inferior jurisdiction, has jurisdiction in a particular case, the subsequent regularity of its proceedings are as conclusively presumed as are those of a superior court; and, *e converso*, there is the same reason for presuming that a superior court, acting ordinarily, does *not exercise* anything but its ordinary jurisdiction — that is, does not exercise a special jurisdiction conferred by statute, and not existing, therefore, except by the statute, that there is for presuming that inferior courts having nothing but statutory jurisdiction are without jurisdiction in any special case, unless it is shown by setting forth the jurisdictional facts. And it is on this ground that the Circuit and District Courts of the United States, even, are required to set forth their jurisdiction on the face of their proceedings, because they have only a statutory authority, and no common law powers.

The New York Superior Court defines a superior court thus: “To constitute a court a superior court (within the meaning of the rule), as to any class of actions, its jurisdiction of such actions must be unconditional, so that the only thing essential to enable the court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties. In

¹¹ *Bumstead v. Read*, 31 Barb., 669.

Kemp's Lesse v. Kennedy, 5 Cranch., 173, Chief Justice MARSHALL, in speaking of the court of common pleas for the county of Hunterdon, New Jersey (the judgment of which and the proceedings upon it being relied on as a defense), said that ‘in considering this question, therefore, the constitution and powers of the court in which this judgment was rendered must be inspected. It is understood to be a court of record, possessing, in civil cases, a general jurisdiction, to any amount, with the exception of suits for real property. In treason, its jurisdiction is over all who commit the offense; * * * * * with respect to treason, then, it is a court of general jurisdiction, so far as respects the property of the accused.’ The action was ejectment, and the defendant made title under a judgment of such court of common pleas confiscating the real estate in question because of the treason of the person who was the common source of title. * * * * * Without entering into a more detailed statement of the facts of the various adjudged cases, or of the reasons on which they were decided, we think it may be stated, as a settled rule, that when the judgment of a local court, in a transitory action, is offered as evidence that a particular fact has been judicially determined by competent judicial authority, the record of the judgment will be no evidence of that fact, unless it affirmatively appears, by the record itself, that all the facts necessary to give the court jurisdiction, both of the subject-matter of the suit and of the parties to it, existed, if the court, by the law creating it, has no jurisdiction of that particular action, nor of any transitory action, unless all the defendants reside, or were personally served with the summons, within the city within which such court is required by law to be held.* Such a court is not only one of limited jurisdiction, but its jurisdiction of every action — of the action itself, being made to depend either upon the place where the defendants reside, or the fact that they are personally served with the summons

*This application of the rule will not meet with general acquiescence, I judge; for, would not such application extend to counties and districts as well? But the principle is apparent.

within a designated locality smaller than a county, it is an inferior court within the common law meaning of that term. If the court had a general jurisdiction of an enumerated class of actions, without reference to the place where they arose, or the parties to them resided, or to the amount sought to be recovered, being a court of record, and proceeding according to the general course of the common law, it might be *quo ad hoc* within the meaning of the rule under consideration. Having jurisdiction in the action, jurisdiction of the persons of the parties in it might be acquired by their voluntary appearance.”¹²

SEC. 481. Where the law makes no provision for re-examining the proceedings of a tribunal of qualified and limited powers, as, for example, judicial authority in laying out highways, its doings may be collaterally inquired into.* But to enable a party to take such advantage, he must be in a legal position to do it, and he cannot do it after having waived his rights.¹³

SEC. 482. A probate court, as to the settlement of the accounts of an administrator, guardian, etc., is held to be a general court, with full and exclusive powers. But it has also been held that as to its power and jurisdiction to order and direct the sale of lands to pay debts, these are special and limited, because, while it may and must settle the accounts of administrators, in all cases, it can only order and direct the sale of lands in special cases, and under peculiar circumstances; and by the common law an executor or administrator had no power over real estate, and there are special conditions on which the limited power to divest the heir or devisee of his interest therein, and to enable the administrator or executor to sell it, depend. Only under the special circumstances can the power be exercised, and only in the manner prescribed by statute, since there is no principle of common law, or of ecclesiastical power, or usage, regulating the matter.¹⁴ And, also,

¹² *Simons v. DeBare*, 4 Bosw., 553.

¹⁴ *Steen v. Steen*, 25 Miss., 520.

¹³ *Gurnsey v. Edwards*, 6 Fost., 224.

*Held, *contra*, in Illinois, as to equalizing tax assessments. *Porter v. R. R.*, 76 Ill., 561.

where the probate court has only a limited right to set out a homestead, and cannot do so where the right is disputed by the heir or devisee, a decree by such court dismissing a widow's petition on the denial by the heirs of her right, will not debar her from applying to another court, having full authority to settle such disputes, and set apart the homestead.¹⁵

SEC. 483. An assessment for taxes rests on the same basis as to conclusiveness as any other judgment. On this, the California court say: "Process is to be served upon the real estate, the owner, and 'all owners and claimants,' in the manner provided. This being done, the court acquires jurisdiction over the persons of all owners and claimants, known or unknown, and the subject-matter. Such being the case, the judgment, when rendered, is conclusive and binding upon all the world, until reversed on appeal, or set aside by some direct proceeding brought for that purpose. Upon the question whether the judgment is merely voidable, or absolutely void, there is no distinction between judgments for taxes and judgments for other causes of action. A judgment is never absolutely void, if the court had jurisdiction of the subject-matter and the person of the defendant, however erroneous it may be. Undoubtedly, property on I street cannot lawfully be taxed for the improvement of property on J street, yet if it should be done, and suit should be brought, and service of process obtained in the manner provided by law, and a judgment finally rendered against the real estate and all owners and claimants, such judgment would not be absolutely void, for the court would have had jurisdiction to determine that question, and by the conditions would have had jurisdiction of all persons interested in the estate. Such a judgment would be erroneous, and would be reversed on appeal, or set aside by some other appropriate remedy. It follows that the mistake of the district attorney in writing J instead I, in the body of the complaint, does not render the judgment void."¹⁶

SEC. 484. In Illinois, it is held that the record of an inferior court must show that the summons was actually read to

¹⁵ *Mercier v. Chace*, 9 Allen, 242,

¹⁶ *Mayo v. Ah Loy*, 23 Cal., 479.

the defendant—that is, the officer's return must show it—and it is also held that even if the return does make such a statement, it may be contradicted by parol.¹⁷ In Georgia, on the other hand, if the docket of a justice of the peace does not furnish evidence of service, and the summons cannot be found, service may be proved by parol.¹⁸ Both these cases seem to be reversely exceptional. At any rate, where the jurisdiction of an inferior court depends on a fact which must be determined by the court, and such fact is asserted in the record, a party who appeared and had an opportunity to controvert such jurisdictional fact, but did not do so, but contested the case on the merits, cannot afterward impeach the record collaterally by showing that the jurisdictional fact did not exist.¹⁹ Also, where certain facts are requisite to the jurisdiction of an inferior court over the parties, and the record shows that there was evidence tending to prove those facts, and that the court adjudged such evidence to be sufficient, the judgment cannot be collaterally impeached, or contradicted.²⁰

SEC. 485. The question of the effect of an express finding of jurisdictional facts by inferior courts has been often before our courts, and carefully considered, and the tenor of the authorities mainly is that such finding is decisive. But, in Illinois, such finding on constructive service is only *prima facie* evidence of the fact, but not conclusive, even as to a superior court.²¹ It is expressly held otherwise, as to courts of probate, in the Second Circuit of the United States.²² And, in New York, the general rule is declared to be, "That when, in special proceedings, in courts or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings having particular qualifications, or occupying some peculiar relations to the parties or the subject-matter, such acts when done are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; and if not so

¹⁷ *Pardon v. Devire*, 23 Ill., 574.

²⁰ *Sheldon v. Wright*, Ibid., 497.

¹⁸ *Gray v. McNeal*, 12 Ga., 425.

²¹ *Goudy v. Hall*, 30 Ill., 116.

¹⁹ *Dyckman v. New York*, 1 Seld., 434.

²² *Segee v. Thomas*, 3 Blatchf., 21.

corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be. There is a necessity for this doctrine, as, without it, it would be almost impossible ever to carry into effect special proceedings affecting property or persons." In the case wherein this was announced, the trustees of a village, under the charter, ordered the construction of a sewer, of which the expense was to be assessed on the property benefited thereby. The charter required, in such a case, the appointment of five freeholders to make the assessment. Five were appointed, but one of them was not, in fact, a freeholder; and, under the rule above announced, it was held that if there was thereon a want of jurisdiction, the proceedings could be directly assailed, but not collaterally.²³ In another case, involving the probate of a will and therefore the residence of the testator at the time of his death, the court did not directly decide the matter, as the case went off on another ground. Yet BROWN, J., delivering the opinion of the court, intimated strongly that the finding of a surrogate court would be conclusive, and said: "This jurisdiction fact [of residence] is one which was open to litigation, and which the surrogate might try and determine, and doubtless did determine in these proceedings. It now becomes a grave question whether the proceedings can be attacked and subverted, collaterally, for the purpose of destroying title to real property devised by the will. Domicil, residence and inhabitancy depend upon acts coupled with intention, which it is not always easy to ascertain, and the courts will be reluctant, I think, to recognize it as a rule of evidence that the residence or habitation of a testator is open to litigation and controversy long after his will has been proved and admitted to record, and valuable rights have been acquired under it."²⁴ Also, in the same state, it has been held that where appraisers under the turnpike act have made inquisition and reported their proceedings, their report is conclusive if it sufficiently appears therefrom that they had jurisdiction of the subject-

²³ *Porter v. Purdy*, 29 N. Y., 106. ²⁴ *Bolton v. Brewster*, 32 Barb., 394.

matter, and cannot be attacked collaterally in an action of trespass; nor can it even be shown that one of the appraisers did not possess the requisite qualification, not being a freeholder.²⁵

In Iowa, it is held that the *sufficiency* of any service, or notice, or publication cannot be inquired into when a court has passed upon it, although a total want of process or notice will, of course, render a judgment a nullity.²⁶ And so, where a notice in a dower procedure was not directed to the heirs by name, but merely in general terms "to all interested in the estate of," etc., and the record did not show that it was served on the heirs, but this was proved by parol, it was held that the defect could not be made to defeat the title of a purchaser under the sale ordered in the proceedings.²⁷ In Minnesota, it is held that even the judgment of the clerk on the fact of service is to be regarded as the judgment of the court, so that it cannot be collaterally attacked.²⁸

SEC. 486. Where a warrant of attorney authorizes the entry of a judgment by confession at any time *from* and *after* the date thereof, an entry on the day of the date is held without legal authority, being premature; and the court manifestly having no jurisdiction of the defendant, such judgment is absolutely void.²⁹ But where a judgment offered in evidence purports to have been rendered by an attorney in fact, whose authority does not appear by the record, or otherwise, it cannot be attacked, although it might have been a fatal objection on appeal.³⁰ And if a record of a judgment rendered in another state shows an appearance by attorney, it will not be permitted to impeach the attorney's authority.³¹ And so, in a domestic judgment, in a court of general jurisdiction, where the record shows that an attorney of the court appeared for the defendant and filed an answer, the jurisdiction of the

²⁵ *Van Steenbergh v. Bigelow*, 3 Wend., 42.

²⁶ *Bonsall v. Isett*, 14 Iowa, 312.

²⁷ *Shawhan v. Loffer*, 24 Iowa, 218.

²⁸ *Kipp v. Fullerton*, 4 Minn., 473.

²⁹ *White v. Jones*, 38 Ill., 163.

³⁰ *Watson v. Hopkins*, 27 Tex., 637.

³¹ *Dalton v. Lusk*, 16 Mo., 102; *Baker v. Adm'r*, 34 Mo., 172.

court cannot be questioned usually, except by showing fraud, or that the defendant was not a citizen of the state, had not been within the jurisdiction during the pendency of proceedings, had not been notified of the pendency of the suit, and had not given authority to the attorney to enter his appearance. "While, however," says the Indiana court, summing up the authorities, "a party is permitted to controvert the authority of the attorney to appear for him when he was without the jurisdiction of the court rendering the judgment, and, upon establishing the fact that the appearance was unauthorized, is relieved from the enforcement of the judgment, this relief will not be granted where the defendant was within the jurisdiction of the court, and an unauthorized appearance has been entered for him by counsel, unless he can establish a defense on the merits to the cause of action in which the judgment was rendered. And this rule is a reasonable one. Where the defendant has not been within the jurisdiction of the court, it would not be just to compel him to come under that jurisdiction and establish his defense to the action, in order to obtain relief from a judgment obtained without notice, and, therefore, the relief granted him must be absolute immunity from the judgment. But where the party was within the reach of the process of the court, although not served with notice, and an appearance has been entered for him by an attorney, the court may well require him to aver, in his proceedings to obtain relief from the judgment, that he has a defense to the action, and if no rights of *bona fide* purchasers have intervened, the court will stay proceedings under the judgment, while it preserves its lien, and permit the party to make his defense to the original action, and to the extent he may succeed in that defense relieve him from the effect of the judgment."³² In Massachusetts, it is held that a domestic judgment of a court of general jurisdiction allowing costs to the defendant, cannot, in the absence of fraud and where the record does not show a want of jurisdiction, be impeached by

³² *Wiley v. Pratt*, 28 Ind., 635, and cases cited.

proving the want of the attorney's authority, and of notice to the party against whom the judgment was rendered.³³ And so in New York,³⁴ although under restriction, as in Indiana. The rule is stated to be that, "If the attorney has acted without authority, the defendant has his remedy against him, but the judgment is still regular, and the appearance entered by the attorney without authority, as to the court." But KENT, Ch. J., says: "This rule of law, though perfectly well settled, would oftentimes be unjust in its operation, if it was not so restrained as to save the party who may be affected by it from injury. It was, therefore, wisely laid down by the King's Bench, in the time of Lord Holt, that if the attorney for the defendant be not responsible, or perfectly competent to answer to his assumed client, they would relieve the party against the judgment, for otherwise a defendant might be undone. I am willing to go still farther, and, in every such case, to let the defendant into a defense to the suit. To carry our interference beyond this point would be forgetting that there is another party in the cause equally entitled to our protection. The plaintiffs in this case are as innocent as the defendant, and their agent, reposing upon the appearance of the defendant by a regular attorney of this court, suspends the prosecution of the writ which he had taken out, and after a delay equal to the ordinary prosecution of the suit to judgment, accepts of a *cognovit*. If all this proceeding is to be vacated, the plaintiffs would probably lose their debt, as other creditors may, in the meantime, step in and gain a preference, and from suggestions made upon the argument this application is very possibly a struggle of subsequent creditors striving to gain a preference over an insolvent's estate. The plaintiffs and such creditors (if such there be), have, at least, equal equity, and, in addition to that, the plaintiffs have the legal advantage. If there had been any collusion between the plaintiffs and the attorney for the defendant, it would have altered the case; but there is none shown or pretended, and

³³ *Finneran v. Leonard*, 7 Allen, 54.

³⁴ *Brown v. Nichols*, 42 N. Y., 30.

my whole opinion proceeds on the ground that the plaintiffs have acted in good faith. I am disposed, therefore, to prevent all possible injury to the defendant, and at the same time to save the plaintiffs from harm. This can be done only by preserving the lien which the plaintiffs have acquired by their judgment, and by giving the defendant an opportunity to plead, if he has any plea to make, to the merits. To go further is not required by any considerations of justice or policy, and it would be repugnant to the established practice and precedents. I think it can be shown that the court is bound by a series of decisions to preserve the judgment. The usual course has been to turn the injured party over to his remedy against the attorney for the deceit, but we now disarm this practice of all its severity by not confining the party to that remedy, but allowing him to come in and plead.

“By licensing attorneys the courts recommend them to the public confidence, and if the opposite party who has concerns with an attorney in the business of a suit, must always, at his peril, look beyond the attorney to his authority, it would be productive of great public inconvenience. It is not usual for an attorney to require a written warrant from his client. He is generally employed by means of some secret confidential communication. The mere fact of his appearance is always deemed enough for the opposite party and for the court. If his client’s denial of authority is to vacate all the proceedings, the consequences would be mischievous. The imposition might be intolerable.”³⁵ But VAN NESS, J., vigorously dissented in the case. Afterward, the Court of Appeals indorsed the doctrine, and defended it by cogent reasoning quite similar to that of Chief Justice KENT above given: “It would be at variance with the scheme and plan upon which we universally administer the law, if a defendant could be prosecuted by a responsible attorney in full authority to practice in our courts, and after having successfully and in good faith defended, as the case might be, through all the tribunals of

³⁵ *Denton v. Noyes*, 6 Johns., 300.

justice, and to final judgment in the court of last resort, be required to submit to an order setting aside the proceedings, and be left to be again prosecuted for the same cause of action on the mere ground that the plaintiff's attorney had no authority from the plaintiff to bring the action [and *vice versa*]. The law which gives to attorneys their commissions must be deemed to guaranty to defendants protection against such a result. And at the same time the rule should yield to equitable considerations where they arise, and should permit the courts to give relief when they can thereby prevent irreparable wrong to either party. And if it be asked why should the party for whom he appears be left to seek his remedy against the attorney? why should not the party who has been subjected to an unauthorized litigation pursue that remedy rather than cast the hazard and burden on one who has done nothing to deserve it? The answer lies in the suggestion already made, that the law warrants a party in giving faith and confidence to one who, by law, is authorized to hold himself out as a public officer, clothed with power to represent others in the courts. And besides this, the consequences of the contrary rule would often be altogether disastrous. Evidence would be lost, witnesses die, the statute of limitations bar claims, and death of parties themselves might often happen. In various ways, to set aside proceedings at the end of a protracted litigation would be to work inevitable wrong to the party who had relied upon an appearance. * * *

When, pending a litigation, the authority of the attorney to appear is denied, and application is made in due season, the court, if probable cause appears, would, in general, protect the party applying.”³⁶

SEC. 487. Where a record recited that “the defendants, by A, their attorney, came into court, and by virtue of his power of attorney filed in this court, confessed judgment for the defendants, for the sum of,” etc., and it was attempted to impeach this collaterally by showing that the only power of

³⁶ *Hamilton v. Wright*, 37 N. Y., 504.

attorney so filed was one which, though marked with the number of the case, did not appear to be signed by some of the defendants, and that such defendants were at the time married women, it was held that the effect and validity of the judgment could not be thus impeached, since the finding of the court as to the question of jurisdiction must be conclusive, unless in a direct proceeding.³⁷

³⁷ *Callen v. Elliston*, 13 Ohio St., 456.

CHAPTER XXXV.

ENJOINING JUDGMENTS, ETC.

- Section 488. Power to Enjoin Judgments exceptional.
- 489. Rank of Courts herein.
 - 490. Co-ordinate Courts.
 - 491. Exceptions.
 - 492. The Spheres in which the Courts act.
 - 493. Courts of other States.
 - 494. A Court does not Enjoin its own Decrees.
 - 495. General Principle of Equity Interference.
 - 496. A Court will not relieve against Negligence.
 - 497. Nor aid a Party to make out his Case.
 - 498. When Injunction may be granted.
 - 499. Fraud.
 - 500. Other Grounds—Accident, etc.
 - 501. Mistakes.
 - 502. Ignorance of Fact.
 - 503. Surprise.
 - 504. Surprise amounting to Fraud.
 - 505. A Court will not Enjoin on same Facts merely.
 - 506. Circumstances after Judgment is rendered.
 - 507. Gaming Contracts.
 - 508. Usury.
 - 509. General Reference.

SECTION 488. In pursuance of our general design, we now proceed briefly to inquire into the method of depriving judgments of their conclusiveness, not by appeal or writ of error, but by invoking the jurisdiction of a court of equity to enjoin the parties from availing themselves thereof. We have already seen that the general rule is that judgments are binding in

all courts, and this power of injunction must be regarded as in a great measure exceptional, and, moreover, as an authority which should be exercised with the highest degree of caution. It acts, it is true, on the parties only, but it is scarcely for this less an interference with the action of the court which pronounced the judgment, and which moves only at the instance of parties.

SEC. 489. Regard is to be had to the respective *rank* of the courts, as it would be manifestly incongruous for an inferior court to restrain the proceedings of a superior court, nor, indeed, in general, should one court restrain the action of another having concurrent jurisdiction. At one time, the "Superior Court of the United States for the territory of Arkansas" complained very loudly of such an interference by a Circuit Court, in this language: "The bill is made returnable to the Circuit Court of Arkansas county, and is there to be tried and heard; and the question is directly involved whether the Circuit Court has the power to stay the process and proceedings of the Superior Court, and by interlocutory or final decree enjoin, restrain or control our acts. We believe there is no power to do so, nor do we think one Circuit Court has the right to restrain or control the proceedings of another, so as to draw to itself an investigation properly belonging to the court where the suit at law was tried, much less to enjoin the proceedings of this court, and retain the bill there. A course of practice fraught with so much inconvenience to suitors, and embarrassment to this tribunal, cannot be submitted to nor supported. It is disrespectful to us, and badly calculated to attain the ends of justice and equity. It is due to the Superior Court to know whether its judgments and process are properly or improperly intercepted. If improperly, must this court await the tedious investigation of a suit in chancery in the Circuit Court before it can enforce its judgments, and before it can know, in any legitimate way, whether the restraint is in conformity with equity, or not? Can it be insisted that, having permitted a judgment to go against him in this court, a party may, by application to an inferior,

paralyze the arm of the superior court, and make the efficacy of our judgments and decrees dependent on an inferior tribunal? We think not. * * * If the Circuit Court has a right to stay our proceedings during an investigation in a suit in chancery, and at last forbid our proceeding at all to execute our judgments, it has as good a right to interfere in the trial of every suit here, and thus enfeeble our powers, forbid the trial of any and every suit on the docket, and hold our judgments and decrees subject to its will. In fact, it would make the inferior paramount to the superior tribunal."¹ Certainly, the interloping inferior court was then in duty bound to consider itself well castigated, and to amend its manners without delay.

SEC. 490. As to co-ordinate equity courts, it has been said, "It is easy to see the great confusion and endless trouble and litigation which might ensue from the exercise of such a jurisdiction. The impropriety — I might say the utter absurdity — of applying to one court to restrain, modify, or correct the orders or decrees of another court of co-ordinate jurisdiction, is also apparent. No instance has been found where one court of equity has thus interfered with the proceedings of another court of equity of the same jurisdiction, and it is believed that none can be."² It is, indeed, plain that one court of equity is no more likely to do justice than another, in any given cause, and removing capriciously from one tribunal to another not higher or different is inherently absurd and confusing. There cannot be any definite or legitimate purpose accomplished by so blind and aimless a transfer of a controversy from forum to forum. The proper course, if any matter arises from which either of the parties needs protection in a pending equitable action, is to apply by petition or motion to the court holding the jurisdiction.³

SEC. 491. Nor does it make any exception to the rule that other parties are brought into the case, on transfer to the second court. There may, however, be exceptions; as, for

¹ *Roshell v. Maxwell*, 1 Hemp. C. C., 26. ³ *Ibid.*

² *Platts v. Denster*, 22 Wis., 484.

example, a fraudulent debtor might confess fraudulent judgments in different judicial districts, in which case it would not be necessary that a creditor should bring a different suit in each different court.⁴ Where the reason of a rule ceases the rule itself ceases.

SEC. 492. Regard is also to be had to the *appropriate spheres* in which the courts respectively act. Thus, the United States courts are paramount in their sphere, namely, where United States laws, etc., are directly involved; and so, the state courts are paramount in their sphere, as where only state laws are connected with the controversy in litigation; so, that neither may intermeddle with the other. Besides this, where these courts are concurrent, the same rule applies as stated above as governing the action of co-ordinate courts. A statute of the United States positively forbids United States courts from interfering with the action of state courts. However, even under that statute there are some modifications of the rule of non-interference, as, for example, if either court issue an execution, by virtue of which the officer proceeds to levy upon the property of another than the judgment debtor, a court of the state, or of the United States, as the case may be, can restrain the officer in so illegally invading the rights of the citizen.⁵

SEC. 493. The same principles govern cases arising in the courts of other states which govern those in the same state; for, since the injunction rests on the parties, and not directly upon the courts, proceedings in another state are as available as those in the same state, if the parties are within the jurisdiction of the restraining court. On this matter, the Georgia court remarks in clear terms: "This bill is not filed for the purpose of restraining the proceedings of the court of New York; the courts of this state have no jurisdiction to do that. Nor would the courts have jurisdiction to enjoin the enforcement of a judgment obtained in the courts of New York between citizens of that state resident there. The question

⁴ *Uhlfelder v. Levy*, 9 Cal., 615.

⁵ *Cropper v. Coburn*, 2 Curt., 469.

here is whether a court of chancery in this state has jurisdiction to restrain the personal action of the defendant, so far as to prohibit him from enforcing the judgment obtained in the courts of New York, according to the facts of this case. There is a clear distinction as to the power and authority of a court of equity in this state, to restrain by injunction the proceedings of a court in another state, and the power and authority in such court to restrain by injunction the personal action of a citizen in this state. In the one case, a court of equity in this state has no jurisdiction; in the other it has jurisdiction to restrain by injunction the personal action of the defendant himself from enforcing an unconscientious demand in another state, whether that demand is reduced to judgment or not, on a proper case being made. The record now before us, in our opinion, makes such a case. The defendant voluntarily came into the courts of this state, in the first instance, to have his claim adjudicated, and that claim has been adjudicated therein, paid off and discharged. We are not aware that comity between the several states of the Union requires that courts of this state shall assume that the courts of New York are any more competent to hear and decide the defendant's claim, and to do him justice than the courts of this state, to the jurisdiction of which he voluntarily submitted the same for adjudication, in the first instance. In restraining him from enforcing his unconscientious demand in the state of New York, the court acts on his conscience *in personam*, and not upon the courts of that state; the person of the defendant is within the jurisdiction of the court; the proceedings of the court in the state of New York are not, and we do not interfere with them. The Supreme Court of New York, in which the judgment was obtained, has no interest in the enforcement of that judgment; the defendant has. And a court of equity in this state, having jurisdiction of his person, will restrain him from making that interest available, when it would be against conscience and the principles of equity that he should do so. In the language of the Master of the Rolls, in *Cranstown v. Johnson*, this court

will not permit the defendant to avail himself of the law of any other country to do what would be gross injustice.”⁶

SEC. 494. It appears novel enough to ask a court of equity to restrain or enjoin the execution of its own decree, especially as the same result can be reached in another way without the necessity of a self-abnegation on the part of the court; namely, by a direct application for a withdrawing of process, or a *supersedeas* thereon. Where an application for an injunction was made as to the decree of the court where the application was made, the Supreme Court, on appeal, pointed out the more appropriate proceeding, and remarked: “An application to a court of equity to restrain its own proceedings is certainly a novelty. We are not apprised of any precedent for such a bill. The process prayed for, and granted in this case, is to enjoin a decree in equity. The principles upon which injunctions are granted to stay the proceedings of other courts, is that from their organization, they cannot take effectual notice of the circumstances which render their proceedings wrongful. But such is not the case with a court of equity. When it is called on to enjoin its own proceedings, it is asked to pronounce that to be iniquitous and wrong which it has already declared to be right and proper. And when it made this latter declaration, it was perfectly competent to declare it wrong, if it were so. (*Reynolds v. Henshaw*, 2 Ired. Eq., 196.) But, although a court of equity cannot, with propriety, be asked to enjoin the use of its own process, which it has previously granted to execute its own orders or decrees, yet a party grieved, or supposing himself to be so, by its use, is not without redress. The court can, and upon a proper case made, supported by affidavits, will withdraw the process itself, or stay an execution by granting a *supersedeas*. (2 Mad. Chan., 375.)”⁷ However, if suit be brought in a law court, on a note given for the purchase money of land sold under a decree in chancery, an injunction, on a proper case made, may be sued out of the court which granted the decree; although, it seems

⁶ *Engel v. Schemmam*, 40 Ga., 211. ⁷ *Greenlee v. McDowell*, 4 Ired., 484.

a petition for such an injunction is regarded as a petition *in the cause* in which the sale was ordered and must, therefore, make the parties of the original cause defendants, and then the injunction can be obtained by paying the costs.⁸ But this item must be discretionary with the court, as indeed costs in chancery usually are.

SEC. 495. The general principle of equity interference with the enforcements of judgments at law, is thus set forth by the Supreme Court of the United States, though without marking out any definite boundaries, except to a very limited extent: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud, or accident, unmixed with negligence in himself or his agents, will justify an application to a court of chancery. On the other hand it may, with equal safety, be laid down as a general rule, that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law. In the case under consideration the plaintiffs ask the aid of this court to relieve them from a judgment on account of a defense which if good anywhere was good at law, and which they were not prevented by the acts of the defendants, or by any pure and unmixed accident, from making at law. It will not be said that a court of chancery cannot interpose in any such case. Being capable of imposing its own terms on the party to whom it grants relief, there may be cases in which its relief ought to be extended to a person who might have defended but has omitted to defend himself at law; such cases, however, do not frequently occur. The equity of the applicant must be free from doubt. The

⁸ *Deaderick v. Smith*, 6 Humph., 147.

judgment must be one of which it would be against conscience for the person who has obtained it to avail himself of it.”⁹

SEC. 496. In general, it is no part of the business of a court of equity to shield a party from the results of his own negligence. And as, in the opinion quoted in the preceding section, the court did not specify any particular instance in which it may do so, I do not know of any such. It must, indeed, be an extreme case where such action would be at all proper. The rule is that, in every case where the party had full opportunity to urge his defense, he is concluded, and must be content to endure the consequences of his own neglect.¹⁰ And even if one claims that the court, through haste or inadvertence, rendered an erroneous decision, whereas he had full opportunity to put in his case previously, and did so, he is remediless, even when he is not chargeable with negligence. When an inferior court commits an error, the proper remedy is by appeal, and not injunction. And, in a superior court — such as a supreme judicial court — there is no other court that can enjoin it.¹¹ But we are now speaking more particularly of neglect in a party. There are two circumstances which one must show to secure the intervention of equity: 1. That it would be contrary to equity and good conscience to allow the enforcement of the judgment; and 2. That the facts which make it so were not available as a defense in the legal action; that is to say, where there was no fraud or mistake, or such preventing cause.¹² For instance, if one fails to plead a payment, or, if credited on the back of the note, to call the attention of the court and jury to it, he cannot avail himself of the aid of a court of equity afterward to make the payment good against the judgment.¹³ And so, one cannot bring a bill to restrain a judgment in attachment on the ground that the attachment writ was improperly issued by the terms of the statute, because that

⁹ *Insurance Company v. Hodgson*, 7 Cranch., 335.

¹⁰ *Emerson v. Udall*, 13 Vt., 483.

¹¹ *Pettes v. Bank*, 17 Vt., 444.

¹² *Clove v. Potter*, 37 Barb., 199.

¹³ *Commissioners etc. v. Patrick*, S. & M., Ch. 111.

should have been urged at law.¹⁴ So, one who could have pleaded *non est factum*, but merely wrote to a counsel to defend him, was held remediless.¹⁵

The Louisiana court justly say that "litigation might be greatly protracted were it permitted to a defendant to withhold his plea of payment or compensation until after a judgment, and then arrest an execution for the purpose of settling questions which, with more propriety, should have been decided when the first suit was on trial. The attempt to arrest a judgment because this court and the inferior tribunal have decided the case incorrectly, is only calculated to bring into ridicule the plaintiff, and those who advised him to institute such a suit."¹⁶ Quite chilling comfort in this, evidently, to the immediate parties. In a case where one could have interposed the defense of usury, but did not, he cannot enjoin the judgment for illegality thereon.¹⁷ And in no case is the consideration of hardship a proper ground for equitable interference.¹⁸ Nor is the entering of a judgment at a wrong term; for herein the defendant has a remedy by appeal.¹⁹ If an officer acts illegally or oppressively in executing process, the remedy is at law, and equity will not interfere.²⁰ And even if a court of equity has concurrent jurisdiction with the court of law in matters of defense, a failure in pleading the defense at law will not be rectified by the court of equity, either by injunction or by allowing the parties to litigate anew the same matters therein which were passed upon in the suit at law, and of which equity has concurrent jurisdiction.²¹

SEC. 497. Nor is it the business of a court of equity to aid a party in making out his case, or enjoin a judgment because of a failure of his testimony, even without his default; as, for

¹⁴ *Windwart v. Allen*, 13 Md., 202.

¹⁵ *Stanard v. Rogers*, 4 H. & M. (Va.), 439.

¹⁶ *Barton v. Roberts*, 3 Rob. (La.), 226.

¹⁷ *Lucas v. Spencer*, 27 Ill., 15.

¹⁸ *Albro v. Dayton*, 28 Ill., 330.

¹⁹ *Shricker v. Field*, 9 Iowa, 367.

²⁰ *Beard v. Freeman*, Breese, 385.

²¹ *Abrams v. Camp*, 3 Scam., 290.

example, by means of the absence of a material witness on the trial at law. Such a reason will not justify an interference, even if an application had been made for a continuance on that ground, and overruled by the court.²² So, if one relies upon a nominal plaintiff in the action, who unexpectedly fails to appear, and thereby the defendant is deprived of the plaintiff's testimony, equity cannot relieve him.²³ Nor will it interfere where one in his bill states that he was unable at the trial to prove his cause, but is now able to do so, this being nothing more nor less than an appeal from the judgment of the law court for a new trial upon the issues in the cause.²⁴ Nor, where the allegations are in relation to the difficulty of obtaining vouchers or a settlement of an administration account.²⁵ Neither will equity grant relief on the ground that the judgment was rendered on the testimony of a suborned witness, in connection also with the allegations that the applicant, because of public business, had been hindered from attending the trial, or preparing for it, and that the Supreme Court had refused a new trial.²⁶

SEC. 498. An injunction may be granted on the ground that when summons was served in the original suit, the defendant was so sick that he could not attend to business, nor remember the service upon him if it really was made.²⁷ And again, where an action is on a promissory note signed by a *feme covert*, in a state where the common law rules prevail, a judgment obtained by default may be enjoined—such a proceeding being a mere nullity, not justifying a levy on her separate estate.²⁸

SEC. 499. Fraud vitiates everything, and a judgment equally with a contract; that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent

²² *Chapman v. Scott*, 1 Cranch C. C., 302.

²³ *Wilder v. Lee*, 65 N. C., 50.

²⁴ *Norris v. Hume*, 2 Leigh., 336.

²⁵ *Wilson's Adm'r v. Bastable*, 1 Cranch C. C., 395.

²⁶ *Smith v. Lowry*, 1 Johns. Ch., 321.

²⁷ *Rice v. Bank*, 7 Humph., 42.

²⁸ *Griffith v. Clark*, 18 Md., 463.

instrument; for, in general, equity will not go again into the merits of an action, even for the purpose of detecting and annulling fraud. Of this matter the Connecticut court say: "The object of injunctions to stay proceedings at law is to prevent injustice by an unfair use of the process of the court. They are granted on the ground of the existence of facts not amounting to a defense to the proceedings enjoined against, but of which courts of equity have jurisdiction, and which renders it against conscience that the party enjoined should be permitted to proceed in the cause. It is well settled that this jurisdiction will be exercised whenever a party having a good defense to an action at law has had no opportunity to make it, or has been prevented by the fraud or improper management of the other party from making it, and by reason thereof a judgment has been obtained which it is against conscience to enforce. Indeed, this falls directly within, and is an illustration of the general rule that equity will interfere to restrain the use of an advantage gained in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice in all cases where such advantage has been gained by the fraud, accident or mistake of the opposing party."²⁹ For instance, if a plaintiff, by fair promises of dismissing the suit, induces the defendant to pay no attention to it, a judgment thus obtained may be enjoined.³⁰ Nor will the consequences be obviated by assigning the judgment to a co-plaintiff, who claims to know nothing about the matter. The Illinois court say as to such a case: "If the complainant was too confiding, it is not for the party who has betrayed that confidence to reproach him with it, or take advantage of it. He lulled the present party into security by assurances that he would do what it was but just he should do, and then in his absence, and in violation of the agreement, took a judgment which he knew he was not entitled to, and then when called upon to release it said he had made over his interest to his co-plaintiff in that suit, and hence he could do nothing

²⁹ *Pierce v. Olney*, 20 Conn., 554.

³⁰ *Weirich v. De Zoya*, 2 Gil., 388.

about it. De Zoya, when called upon for the same purpose, excused himself for insisting on the payment of the judgment by saying he knows nothing about it. If he did not participate in the original fraud, by insisting upon its fruits he becomes a party to it. He cannot excuse himself as being a *bona fide* purchaser of the interest of his co-plaintiff who actually committed the fraud. It having been committed by one of the parties to the judgment, it is as much tainted as if all the parties had participated in the fraudulent practices and designs.”³¹ In a case in Maryland there was a stipulation between the defendant and the plaintiff’s attorney to the effect that, 1. The suit at law should not be prosecuted until there was an ascertained deficiency of assignments to pay the claim; 2. Judgment being entered nevertheless, the plaintiff agreed with the defendant’s attorney that if the defendant objected to the judgment, it should be stricken out; 3. Objection being made, it was obviated by the assurance of the plaintiff’s attorney that the judgment should make no difference in his course as to collecting the debts assigned; that no execution should be issued thereon until the assignments could be collected, and that time for this purpose should be allowed. A violation of this stipulation was held to justify the interference of a court of equity³² — the principle being, doubtless, that when a party assumes such a relation of express confidence to another that the latter has a right to rely upon him, equity will enforce that confidence as it would a trust; it being against good conscience that it should be disregarded.

It matters not that a judgment was effected by means of a compromise. The consent to the actually existing judgment does not bear away fraud in the procuring of the compromise.³³

And where a fraudulent change is made in the record after judgment rendered, so that the amount is increased, an injunction lies.³⁴

Likewise, there are a few exceptions to the rule that equity

³¹ *Weirich v. De Zoya*, 2 Gil., 388. ³³ *Haper v. Hart*, 12 B. Mon., 427.

³² *Kent v. Ricards*, 3 Md., Ch. 396. ³⁴ *Babcock v. McCamant*, 53 Ill., 215.

will not go behind the judgment to interpose in the cause of action itself, but only where there was some hinderance, besides the negligence of the defendant, in presenting the defense in the legal action. There is an old case in South Carolina to the effect that fraud in obtaining a bill of sale would justify equitable interference as to the judgment obtained thereon.³⁵ But I judge it stands almost, or quite alone, and has no weight as a precedent.

SEC. 500. Besides fraud, the grounds of equitable relief against judgments are mainly four: 1. Accident; 2. Mistake; 3. Ignorance of fact; 4. Surprise. And first, in regard to accident, where an instrument is lost which would have afforded a defense to the action, this circumstance will justify an injunction against the judgment obtained therein; as, for example, an article of agreement,³⁶ or a written agreement or stipulation in regard to the contract, in pursuance of which the note was given that forms the basis of action — without which stipulation the defense at law could not be made;³⁷ or, indeed, any unavoidable accident preventing a party, without laches on his part, from making the necessary defense at law.³⁸

SEC. 501. Second, as to mistakes, these must be of fact, and not of law, in every instance, to justify interposition; as, for example, if the mistake was that the complainant's counsel believed that under the law the court could not enter judgment at the first term after suit was commenced, the consequence cannot be obviated in equity.³⁹ And so, where one mistook the nature of the proceedings against him, and the steps necessary in the cause, in consequence;⁴⁰ or, where one paid money to another knowing the facts, but mistaking his obligation under the law, he cannot recover it back, and if he thus gives a note, and a judgment is recovered on it, the judg-

³⁵ *Crawford v. Crawford*, 4 Desauss. Eq., 176.

³⁶ *Wilson v. Davis*, 1 A. K. Marshall, 218.

³⁷ *Vathir v. Zane*, 6 Gratt., 246.

³⁸ *Humphreys v. Leggett*, 9 How., 314.

³⁹ *Shucker v. Field*, 9 Iowa, 372.

⁴⁰ *Meem v. Rucker*, 10 Gratt., 506.

ment cannot be enjoined.⁴¹ But a mistake of fact, the necessary result of which is substantial injustice, is a proper basis of equity interference.

SEC. 502. Ignorance of fact is closely associated with the ground last above specified, and rests on precisely the same principles. A subsequent discovery of such material fact, of which the party was unavoidably ignorant during the progress of the cause, is a basis for equitable relief.⁴² This rule is for the reason that a state of ignorance is a moral incapacity of making a defense on the trial. However, it is not sufficient that the defendant did not know of the grounds of defense during the trial, but it must likewise appear that the ignorance did not result from any want of diligence.⁴³

SEC. 503. Surprise is a ground kindred to those of accident and mistake, and subject to the same principles, in large degree; or, it is kindred to fraud if it be the result of a willful act of the opposite party, intending to mislead. I do not know that the point has ever been decided, but, on principle, I apprehend that if the consequences of surprise could have been obviated by prior diligence, it will not be a ground for equity relief, that is, if one by want of vigilance puts himself into a position to be surprised, he will in vain implore protection. The general rule as to surprise is thus stated: "The general rule is that where relief can be afforded at law, it shall not be asked for in this court; *but under such circumstances* as the plaintiff could not control, and which must be *true*. By these plain and simple principles, then, let the present question as to jurisdiction be settled. A suit in chancery had been brought which might have embraced this very subject, and the defendant, the present plaintiff, was served, as he supposed, with process in that suit, and, therefore, he may have been so far mistaken as to aver with great truth that he had no remedy at law, since he suffered a judgment to go against him when, in fact, he did not know that he was sued. Could there have been a more complete surprise than in the first

⁴¹*Hubbard v. Martin*, 8 Yerg., 500.

⁴²*Leggett v. Morris*, 6 S. & M., 729.

⁴³*Hubbard v. Hobson*, Breese, 193

instance, to have met with an execution instead of a writ of habeas corpus. There certainly could not, to my mind; and, hence a good ground for relief in equity. But it is said that this will always permit a party to make his defense in equity instead of at law. To this argument two sufficient answers may be given: 1. That upon the coming in of the answer, if the circumstances relied upon in the bill appear not to be true, the court will always dissolve the injunction; as, in this case if the defendant could show that before the judgment at law the plaintiff really knew of the suit, he should not be any longer entertained in this court, but should abide the consequences of his own neglect. And 2. Though the circumstances may be true, and relief afforded, yet, in general, it must be at the costs of the plaintiff. Attention to these rules will afford, as it is believed, a sufficient corrective to those who might otherwise be disposed to sport with the sacred obligation of another.”⁴⁴

Usually, however, if the defendant fails to avail himself after verdict of opportunity to secure a new trial by application to the court of law holding the jurisdiction, or by appeal to a higher court, he will be denied relief in equity. Yet, if he forbears such an application because manifestly it would prove fruitless, he is not debarred by the omission to apply. “It must be borne in mind that the same surprise which has subjected him to an improper verdict may disable him from applying to the common law court for a new trial, or that circumstances afterward transpiring may serve to show that it was not then in his power to sustain the merits of his application by such other evidence as might have been requisite in addition to his own affidavit.”⁴⁵

SEC. 504. I have intimated above that surprise may amount to fraud. In a Connecticut case, I avail myself of the syllabus of the reporter: “A, a manufacturing company in this state, having had dealings with B, a dealer in New

⁴⁴*Mosby v. Haskins*, 4 Hen. and Mumf.(Va.), 427.

⁴⁵*White v. Ex'r.*, 5 Gratt., 648.

York, C, as the agent of A, purchased a quantity of iron of B, knowing that A was the party with whom he was contracting. Afterward, B brought a suit for this iron against C, individually, in the superior court of the city of New York, and process was duly served on C by arresting him. Soon after the suit was instituted, C called on D, the attorney of B, and explained to him the circumstances under which the contract was made, and the mistake in suing him individually, instead of A, his principal. D said to C that he would see him again on the subject. This D did not do, but he shortly after wrote C a letter informing him that nothing would be done in relation to that suit until further notice should be given him. C, relying on this communication, and hearing nothing further from D or B, did not appear in person, or attorney, before the court to which the process was returnable; but D appeared and obtained a judgment in said suit against C, without his knowledge. The record of such judgment stated that on the first Monday of April, 1846, came, as well the plaintiff by his attorney, as the defendant in his proper person, and the defendant defends the wrong and injury, and says nothing in bar or preclusion of said action, wherein the plaintiff remains undefended of the defendant. In November, 1848, B brought in this state an action of debt on the judgment so obtained in New York, during the pendency of which C filed his bill in chancery to restrain B from enforcing his judgment. *Held,*

“1. That the taking of judgment, under these circumstances, in the suit against C in New York, operated as a surprise upon C, tantamount to a fraud, and justly called for the interposition of a court of equity, unless prevented on the ground of some technical objection.

“2. That the ‘full faith and credit’ required by the constitution of the United States and the law of Congress to be given to the judicial proceedings of other states, did not preclude such interposition, inasmuch as a court of equity here does not impugn the New York judgment, but considers the equities subsisting between the parties, and acts upon them

personally, restraining the one from pursuing a judgment so obtained, and protecting the other.

"3. That the record of the New York judgment finding that the defendant appeared in his proper person, and said nothing in bar or preclusion of said action, does not necessarily conflict with the facts above stated, inasmuch as the plaintiff in that suit might, under the laws of New York, have obtained a judgment, and had a record made like the judgment and record in question, without any *actual* appearance of the defendant."⁴⁶

SEC. 505. Where a party moves for a new trial in the court of law where an action is litigated, and fails, he cannot, then, on the same facts, go into equity to enjoin the judgment. And this would be particularly absurd where the same court is endowed with both law and equity jurisdiction.⁴⁷ The decision of the court on a motion for a new trial must be binding on a court of equity unless there are some grounds not available at law except through the interposition of equity.⁴⁸ And even as to the proceedings of subordinate tribunals of special or local jurisdiction, a court of equity has no right to inquire into them for the purpose of setting them aside, if void at law, or for the purpose of restraining them, and this is held to apply to the certificate of a jury summoned under a statute to examine an alleged encroachment on the highway.⁴⁹

SEC. 506. When circumstances arise *after the rendition* of a judgment which render it unconscientious to enforce it, a party may be relieved in equity, as on payment, or a subsequent reversal of the judgment,⁵⁰ or a tender refused and execution issued; and in this case a former application for an injunction against the judgment will not bar an application after the additional fact has transpired.⁵¹

SEC. 507. There is a notable exception to nearly all the general rules as to the necessity of diligence on the part of

⁴⁶ *Pearce v. Olney*, 20 Conn., 544. ⁴⁹ *Hyatt v. Bates*, 35 Barb., 308.

⁴⁷ *Collins v. Butler*, 14 Cal., 226. ⁵⁰ *Smith v. McCluskey*, 45 Barb., 617.

⁴⁸ *Danaher v. Prentiss*, 22 Wis., 317. ⁵¹ *Dwyer v. Goran*, 29 Iowa, 126.

one involved in a legal controversy in order to obtain relief in equity against a judgment rendered at law. A gaming contract, for example, is considered so abhorrent to the law that equity will intervene under almost any circumstances to annul it, even after it has, by the default of a defendant, passed into judgment. This is clearly set forth by the Virginia court in the following language: "A gaming security or consideration, however, forms an exception to the general rule requiring a defendant at law to avail himself there of a good legal defense to the action. Our act of 1748 (1 R. C. Ch. 147, p. 561, taken from the statute of 9 Anne, Ch. 14), not only renders the gaming transaction unlawful, but expressly avoids all promises, contracts, judgments, and other securities for money won at play, and its policy is to extirpate an immoral and pernicious practice, injurious not only to the parties and their families, but to the public weal. It therefore behooves courts of equity, as well as courts of law, to suppress the performances, contracts, and securities. A party injured may, at his election, defend himself at law, but he is not bound to avail himself of that opportunity, nor to wait till a verdict is had, nor till an action is brought against him in the legal forum. He may suffer judgment to go against him at law, and restrain proceedings upon it by a bill in equity; or, before or after action brought file his bill in equity to compel the surrender of any security founded on such unlawful and void consideration, and the refunding of whatever payments may have been made upon it. (1 Story's Eq., § 302; *Woodroffe v. Farnam*, 2 Vt., 291; *Rawdon v. Shadwell*, Amb., 269; *Fleetwood v. Jansen*, 2 Aik., 467; *Newman v. Franes*, 2 Aust., 519; *Andrews v. Berry*, 3 Aust., 634; *Woodson v. Barrett*, 2 Hen. & Mum., 80; *Skipwith v. Strother*, 3 Ran., 214.) A judgment itself, when recovered without defense, is, within the true meaning of the statute, nothing more than a security, though there has been no agreement that it shall operate as such, or be obtained or suffered for that purpose. If this were not so, it would be easy to evade the provisions of the statute, inasmuch as in most cases

it would be difficult to prove that there was such an agreement or understanding. And besides, the mischief is equally great whether there was or not.

"It must be admitted, however, that in an action founded upon a gaming security, if the defendant elects to make his defense at law, and, upon a full and fair trial of the question in that forum, a verdict is rendered against him, he cannot be permitted to renew the controversy, upon adverse testimony, in a court of equity; for, if this were allowed it would be in effect an appeal from the verdict of a jury; and yet, notwithstanding such election, if the defendant has been surprised at law by reason of some fraud, misfortune or accident, which has prevented him from having a full and fair trial before the jury, he may still resort for redress to a court of equity. Nor will he be precluded from doing so by its appearing that he had an adequate opportunity of obtaining a new trial by application to a court of law. The case of a gaming promise or security is an exception to the general rule on the subject — that rule being derived from the obligation of the party in most cases to avail himself of his opportunity of defense at law, whereas, in the case of a gaming promise or security, he is under no such obligation. And as he may at first waive all defense at law, and seek relief in equity, so when he has been prevented by surprise from making his defense available at law, he is not bound to pursue it further in that forum, but may resort to a court of equity, which has from the beginning a more complete and searching jurisdiction of the controversy, and which treats all judgments founded on a gaming consideration where there has been no defense at law, or where from adventitious circumstances, there has not been a full and fair trial of the question at law, as mere securities."⁵²

Probably these principles apply to all or most matters of illegal consideration in contracts. Yet the authorities are somewhat divided upon the need of diligence therein — the Tennessee court dissenting entirely from the doctrine of the above extract, which, however, is well fortified by the refer-

⁵² *White v. Ex'r*, 5 Gratt, 648.

ences cited in it. The rule in Tennessee is, that a note given upon a gaming consideration is void, and that, therefore, there is always an adequate defense afforded at law. And if this is not employed, and no sufficient excuse is given for the neglect to urge it, no relief can be had in equity.⁵³ Probably the Tennessee statute was not so rigid or positive in its provisions.

Moreover, in Virginia, it has been held, on the authority of *Bomer v. Bampton*, 2 Strange, 1155, and *Lowe v. Waller*, Doug., 713, that a gaming transaction is so absolutely void that an innocent assignee of a security given therein is not protected. TUCKER, J., in a case involving this question, said: "Where any instrument is absolutely void in its creation, it cannot, I conceive, be made valid by any subsequent transaction arising immediately out of it. It is not like a security given by an infant, which is only voidable."⁵⁴

SEC. 508. Usury seems, however, to be subject to the general rule of diligence in legal defenses. But, in Tennessee, it is held to be an exception so far as this, that embarrassment in the legal trial may be a ground for the interposition of equity.⁵⁵ Yet, in reality, I suppose this is an embarrassment arising from fraud of the opposite party, so that the equity interference rests on the fraud, which brings it again, at least measurably, within the scope of the general rule. The court, however, say: "An oppressed debtor in the hands of an artful and heartless usurer might be induced so to change securities, adding usurious interest, and for a long course of time repeating this process so as to make it difficult for a jury in the mode of trial before them to defeat the contrivance and separate the sum really due. And, at the present term, in the case of *McKoin and Wilkerson v. Cooley*, the court say, 'That the usurer might make the courts of justice the medium through which to consummate his usurious contracts, holding over his debtor an influence that would paralyze his will, and prevent him from making his defense.' The question in the case before us is, whether the facts in this bill show a state of things falling within the scope of these exceptions, that is,

⁵³ *Giddens v. Lea*, 3 Humph., 134.

⁵⁴ *Woodson v. Barrett*, 2 H. & M., 88.

embarrassment in the legal forum arising from complication and multiplication of securities, or where the very suits at law and judgments themselves are regarded as usurious securities, constituting a portion of the devices resorted to in order to secure as well as conceal the usury. And we think this case belongs to either category. It would be idle and delusive to regard these judgments as the result of litigation in which the parties were seeking, the one to resist, the other to enforce the contracts between them. The judgments were but processes in the operation, like the notes themselves, as a system of production and reproduction. The parties were never at arms'-length. The complainant throughout was the slave of defendant *in vinculo*. How could relief at law have been given upon these thirteen notes of the aggregate amount of \$2,500, including principal and interest and usury and costs, repeatedly compounded and re-compounded, and this, too, before a justice of the peace whose jurisdiction is limited to \$200, and who, to do justice, would have had to consider the whole transaction from the beginning, and the entire amount involved in all the cases, and to have given judgment for the true amount. The transaction, as set forth in the form of the bill, is a most nefarious one, and the complainant's title to equitable relief is, under the circumstances, very clear.”⁵⁵

SEC. 509. The foregoing is, to a degree, an accurate outline of the jurisdictional relations of courts of equity and law in this particular of enjoining proceedings and judgments. Of necessity the detailed applications thereof must be sought in works professedly treating of the subject of Injunctions, as they do not fall within the compass of this treatise. The principles stated may be briefly grouped, or crystallized rather, in the rule that whenever it would be unconscientious in a party to enforce an advantage he has gained at law, without the default of his opponent, he will, on proper application, be restrained by equitable interference from pursuing that advantage, although accorded to him by the judgment of a legal court.

⁵⁵ *Frienson v. Moody*, 3 Humph., 564.

CHAPTER XXXVI.

CONCLUSIVENESS OF FOREIGN JUDGMENTS.

Section 510. Distinction between Foreign Judgments and those of sister States.

- 511. Conclusiveness of Foreign Judgments explained by Story and Wharton.**
- 512. Small and Great Powers.**
- 513. Questions of Assets belonging to an Estate.**
- 514. Service of Process.**
- 515. Civil Law Rule.**
- 516. Pleading of Judgment in Suit on Judgment.**
- 517. General Conclusion and exceptions thereto.**

SECTION 510. When we speak of foreign judgments, we mean the judgments rendered in other nationalities. Those rendered in our sister states occupy a kind of intermediate position between domestic and foreign judgments, and I therefore reserve them for consideration afterward as partaking in part of the dual nature of both domestic judgments, which we have treated of, and foreign, which is the topic of the present chapter. As to the United States courts, they are not to be regarded as in any way foreign to the state courts, because they belong to the same nationality, and, moreover, the constitution and laws of the United States are the supreme law of each individual state; the laws of the states respectively furnish rules of decision for the United States courts; and causes may be removed from the state courts into the United States courts. And, further, the citizens of a state are amenable to the process thereof, and may be called as jurors to serve therein, and their property may be directly levied upon under

executions issued from such courts on their judgments.¹ And so, the seal of a United States court carries its own exemplification within a state,² or within another state from that wherein it is held.³

SEC. 511. Certainly, I cannot do better than to set out by quoting from Story's Conflict of Laws on the vexed question of the conclusiveness of a foreign judgment, his summary of the doctrine as drawn from the authorities, or rather his comment upon it. He says, section 606, "The present inclination of the English courts seems to be to sustain the conclusiveness of foreign judgments, although certainly there yet remains no inconsiderable diversity of opinion among the learned judges of the different tribunals." And in section 607 he continues: "It is, indeed, very difficult to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew on a suit upon the foreign judgment. Some of the witnesses may be since dead, some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court, may have been decidedly in favor of the judgment, upon a partial possession of the original evidence; they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault for slander, for conversion of property, for a malicious prosecution, or for a criminal conversion; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence, and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment and to proceed *ex aequo et bono*? Or is it to administer strict

¹ *Barney v. Patterson*, 6 Har. & J., 203.

² *Pepoon v. Jenkins*, 2 Johns. Cases, 119; *Womack v. Dearman*, 7 Port. (Ala.), 516.

³ *Thomson v. Lee Co.*, 22 Iowa, 209.

law, and to stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These, and many more questions, might be put to show the intrinsic difficulties of the subject. Indeed, the rule that the judgment is to be *prima facie* evidence for the plaintiff, would be a mere delusion if the defendant might still question it by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or that upon its face it is founded on mistake, or that it is irregular and bad, by the local law *fori rei judicatae*. To such an extent the doctrine is intelligible and practicable. Beyond this the right to impugn the judgment is, in legal effect, the right to retry the merits of the original cause at large, and to put the defendant upon proving those merits." The editor of the 7th edition inserts in brackets, as § 606a, this remark: "This subject has been much discussed in England, of late, and the well established present English doctrine is, that a foreign judgment is only *prima facie* evidence, in England, upon the question whether the foreign court had jurisdiction of the subject-matter, or of the person of the defendant, or whether the judgment was regularly obtained, but that it is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it was founded were never made, or were obtained by fraud of the plaintiff, and it is held that any pleas which might have been pleaded to the original action cannot be pleaded to the action upon the judgment."

Mr. Wharton, in his Conflict of Laws, § 817, quotes from Bar, a German legal writer, some striking remarks on the necessity of holding foreign judgments conclusive, so far as above stated: "The parties in such new suit could then try the

case on new facts, and new laws, and even keeping out of view the fact that in independent states distinct systems of law prevail, it is probable that in many cases opposite results would be reached even on the same legal basis. A domestic court, for instance, in a particular case, decides an issue for the plaintiff, in face of a foreign judgment to the contrary. Either the plaintiff's property or person, subsequently coming into the defendant's court, the defendant sues the plaintiff on the same cause of action, and there recovers; and so on, as long as either party has anything in the other's country which could be attached. In this view, just so far as the principle is applied, is business intercourse between the countries suspended; and, the shock is one which affects the subject equally with the foreigner. Each suffers equally from the failure to recognize as authoritative the judicial action of a foreign state."

SEC. 512. It is held that the principles apply as well to great and small powers, and also to provinces as well as independent nations. Thus, where a transcript was produced from the Court of Common Pleas of Upper Canada, on the trial of a cause in New York, the defendant objected to its introduction on several grounds, among which was the ground "that this government does not recognize the province named in the record as one of the independent powers of the world, and that it is not so in fact; and that the evidence of the authority of the officers acting must come from the government creating them," that is, in this case, from Great Britain. The Court of Appeals said on this point, *per* DAVIES, J., "I do not read our statute in reference to the exemplification of the records and judicial proceedings in any court, in any foreign country, as confirming the admission of the records only of such foreign country as shall have been acknowledged by this government as one of the independent powers of the world, and with which we have diplomatic intercourse. I think the obvious meaning of this statute is to admit the records of any court of any foreign country, and it is quite immaterial whether such foreign country is one of the great powers of the world, or one of minor importance, and having a circumscribed extent. The

size of the country cannot alter the rule of evidence, and the records of a court of the Republic of San Marino are of equal validity as those of the Empire of all the Russias. The only question is, does the record come from the court of a foreign country? If so, and it is properly authenticated, it is to be admitted as evidence, under the provisions of our revised statutes. The court will take judicial notice that the province of Upper Canada is a foreign country, and forms no part of our own; that it has a government and courts, and that those courts proceed according to the course of the common law."⁴

SEC. 513. It has been held by the Supreme Court of the United States that questions adjudicated in England, as to heirship, in regard to assets there, are not decisive here as to assets belonging to the same estate. This, however, really rests on the usual ground that the basis of action being different in the second action, there is no bar. The determination of heirship does not necessarily include title to any property. After disposing of the question of comity in relation to the case, the court said: "The next ground, and that relied on with most confidence, in support of the bar, is that John Aspden of London, and those representing him after his death, were British subjects, residing in Great Britain, and that the contest and only matter litigated in the high court of chancery was whether John Aspden of London was, or was not the heir and consequent devisee of Matthias Aspden, and that this fact having been found by the decree against the complainants, established and concluded all proof to the contrary of such adjudication directly on the single fact of title, and that the representatives of John of London could not be heard in another jurisdiction to disavow the conclusiveness of the finding by a court of their own government to which they had resorted. That the English bill involved directly the question of heirship, and that nothing else was contested, is undoubtedly true; but it is equally true that no evidence was introduced by the complainants there to establish their title, nor was there had any

⁴ *Lazier v. Wescott*, 26 N. Y., 148

adjudication on the merits of their claim; so that no equitable considerations are violated by our present judgment in any aspect that the evidence may be viewed. What effect the decree has in England is a question for the courts of that country to settle; nor will we now determine whether, in our judgment, by the comity of nations, the proceedings should have a similar effect here, or what effect they should have. The question for us to dispose of is whether the administrator and distributees of John Aspden of London shall be heard in the Circuit Court, or whether their evidence of title is barred. We have already stated that the Pennsylvania assets stand unaffected, and will only add that the assumption that a complainant or plaintiff is estopped by a judgment against him from introducing evidence in a second suit, and in another country, for other property, on the ground that the fact of title had been adjudged and concluded by a former judgment or decree (thus separating the title from the property), is an abstract proposition, inconsistent with the due administration of justice, and not recognized in our system of jurisprudence, or that of Great Britain, and is aside from any question affecting the comity of nations. Giving the British decree all the force and effect that could be accorded to it, if it had been made in a state of this Union, it yet establishes no fact as respects any title to the Pennsylvania assets, nor would the rules of evidence be sufficient, in separate suits pending in the same court, for different parcels of property, even between the same parties. And therefore, we certify to the Circuit Court, that the evidence introduced 'touching the plea in bar,' is no estoppel to the representatives of John Aspden of London, in so far as they seek to recover the assets of Matthias Aspden's estate in the course of administration by the Orphan's Court of Philadelphia County."⁵

SEC. 514. The United States Supreme Court have held that a judgment recovered in England against a party in the United States, without process or any notice of the suit, except a

⁵ *Aspden v. Nixon*, 4 How., 499.

personal notice given in the city of Baltimore, had no validity, even of a *prima facie* character, but was a sheer nullity.⁶

SEC. 515. The civil law rule on the subject is given by the German Jurist Bar, as cited by Wharton in his work on the Conflict of Laws, § 793, and is not materially different from the now settled doctrine stated above as prevailing in England, and in this country. Mr. Wharton says: "According to Bar, whose treatise is in this relation both recent and exact, and who writes from the standpoint of the modern Roman law, so far as it is the common law of the continent of Europe, judgments have extra-territorial force according to international law, in the following cases:

"1. When rendered by the courts of the state in which the defendant is domiciled, in all suits *in personam* and in all possessory (real) actions which concern movables, and of which the *former rei sitæ* has not jurisdiction.

"2. When rendered by the courts of a state by whose laws a contract is to be adjudicated in those cases in which the debtor personally resides in such state, or has in it property not merely illusory, provided that in such cases, the judgment is based on the contract, whether for its execution or its rescission.

"3. When rendered by the courts of a state in which a tort or delict has been committed, in a suit for damages against the wrong doer, provided such damages are compensatory and not vindictive.

"4. When rendered by the courts of a state in which are situated either goods or claims, when such goods or claims are attached, the judgment in such case being effective up to the value of such goods or claims, when it is entered on the cause of action for which the attachment is laid, the court having jurisdiction of such cause of action.

"5. When rendered by the courts of a state in all proceedings *in rem* as to things situate in such state, whether movable

⁶ *Bischoff v. Wethered*, 9 Wall., 814.

or immovable, provided such things have a continuous abiding place."

SEC. 516. As to a judgment pleaded by a defendant, the same writer says, § 835, "Jurists of all nations have recognized the distinction between a foreign judgment when offered as a plea in bar by the defendant (*exceptio rei judicatae*), as such a *plea* is styled by the Roman law, and a foreign judgment when presented to a domestic court by the plaintiff in order to obtain execution. As has been seen, to the foreign judgment when offered by a plaintiff as groundwork for domestic process, the defendant, on the strictest view, can plead the incompetency of the court, or the gross injustice of the judgment, on international principles, while, in the continent of Europe, the execution of this judgment is a matter of executive discretion, more or less liberally exercised. It is otherwise, however, when the defendant to a domestic suit pleads that the plaintiff, on the same cause of action, has prosecuted him or his property to judgment, in a foreign land. It would seem to be a principle of natural equity that the plaintiff having thus elected his tribunal,* be it competent or incompetent, and having pressed the suit to judgment upon the defendant's appearance, should be estopped *pro tanto* from vexing the defendant elsewhere, on the same demand. And such an opinion has been pronounced by high authorities in France, Germany, England, Scotland and the United States. It should be observed, however, as has been said, that the defendant must have appeared to the first suit, or that in some other way the court had international jurisdiction. Thus, in England, it has been ruled by Chief Justice TINDAL that it is competent for the plaintiff, in a replication to such plea, to show that the defendant was never served in the first suit, and that hence such suit was a nullity. The judgment, it was said in another case, must have been decisive and binding in the land where given. So, in the United States, it has been held that the plea is not good when there is no jurisdiction attaching to the defendant's person."

*This is not accurate, and is a false ground, therefore. This so called *election* of a tribunal, is, in almost every instance, compulsory.

SEC. 517. On the whole, then, it may be said that the whole question of the conclusiveness of foreign judgments has been very elaborately examined, and that the civilized world have come to a uniform conclusion, with some immaterial variations; as, for instance, France, and some other countries, proceed on the basis of reciprocity, holding as conclusive the judgments of those nations which reciprocate in kind. That uniform conclusion is in favor of the binding force of foreign judgments, under certain limitations. We need not pursue the matter here, as there is no distinction worth noting between foreign judgments and judgments rendered in sister states in our country; and so, to avoid repetition, we will refer the subject of this chapter for further examination and illustration to the one immediately succeeding.

CHAPTER XXXVII.

JUDGMENTS RENDERED IN OTHER STATES OF THE UNION.

Section 518. United States Constitutional Provision.

- 519. Rule expounded by United States Supreme Court.
- 520. United States Courts included in the Rule.
- 521. Whether Criminal Judgments are.
- 522. Qui tam and Penal Actions.
- 523. Decrees of Chancery Courts.
- 524. Judgment and Decree as to Lands in other States.
- 525. Probate Matters — Assets.
- 526. Administrators in Different States.
- 527. Garnishment Proceedings.
- 528. Inferior Courts.
- 529. Relations of Original and Subsequent Judgments.
- 530. The Original Cause of Action Barred.
- 531. The test of Faith and Credit.
- 532. Service of sci. fa. on Trustee Process.
- 533. Pleas in Subsequent Action.
- 534. Unconstitutional State Laws.
- 535. Statutes of Limitation.
- 536. Errors and Irregularities.
- 537. Want of Jurisdiction.
- 538. Jurisdictional Presumptions.
- 539. Constructive Service.
- 540. Garnishment Service.
- 541. Necessity of Service or Appearance.
- 542. Pleas—Record Recitals.
- 543. Record Recitals explained — Differences.
- 544. Opportunity to defend Sufficient.
- 545. Police Regulations and Public Policy.

Section 546. Personal Appearance by Mistake.

- 547. Legal Presumptions as to Laws of other States.**
- 548. Partnership and Individual Judgments.**
- 549. Impeachment for Fraud.**
- 550. Going to another Jurisdiction for Divorce, etc.**
- 551. General Rule as to Fraud.**
- 552. General Rule of Conclusiveness.**
- 553. Effect of pending Appeal where Judgment Rendered.**
- 554. What the Record Transcript should show.**

SECTION 518. The conclusiveness of these is expressly provided for by a direct provision of our national constitution, namely: "Full faith and credit shall be given in each state to the public acts, records and judicial proceeding of every other state," so that if a judgment is conclusive in the state where it is pronounced, it is conclusive everywhere. This is the principle to be illustrated in the present chapter. And the matter of conclusiveness we shall find is to be tested, or rather determined, in large degree from the authenticated records of the court where the judgment was rendered. The conclusiveness, however, does not preclude all inquiry into jurisdiction of persons or subject-matter as to the court, or as to the state itself.¹

SEC. 519. As early as 1813, the Supreme Court of the United States laid down the rule which now, I think, is universally followed, although previously there had been much variance as to the conclusiveness of a judgment rendered in a sister state, some holding, notwithstanding the direct provision of the national constitution, that such judgments had only a *prima facie* character abroad. The court held that *nil debet* was not a good plea to an action on such a judgment, but only *nul tiel record*, and said: "Were the construction contended for by the plaintiff in error to prevail, that judgments of state courts ought to be considered *prima facie* evidence only, the clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in Congress to give a conclusive

¹ Story on Const., § 1313.

effect to such judgments. And we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive, when a court of the particular state where it is rendered would pronounce the same decision.”²

In 1839, the same court gave an authoritative interpretation of the constitutional provision, and also an explanation of the ruling just quoted, thus: “Though a judgment obtained in the court of a state is not to be regarded in the courts of her sister states as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain an action upon the judgment, it is to be considered only distinguishable from a foreign judgment in this, that, by the first section of the fourth article of the constitution, and by the act of May 26, 1790, the judgment is a record conclusive upon the merits, to which full faith and credit shall be given, when authenticated as the act of Congress has prescribed. It must be obvious when the constitution declared that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and provides that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof, that the latter clause as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgment by suits in the tribunals of another state. The authenticity of a judgment, and its effect, depend upon the law made in pursuance of the constitution; the faith and credit due to it as a judicial proceeding of a state is given by the constitution, independently of all legislation. By the law of the 26th of May, 1790, the judgment is made a debt of record, not examinable upon its merits, but it does not carry with it into another state the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit. It must be conceded that the judgment of a state court cannot be enforced out of a state by an

² *Mills v. Duryee*, 7 Cranch., 485, JOHNSON, J., dissenting.

execution issued within it. This concession admits the conclusion that, under the first section of the fourth article of the constitution, judgments out of the state in which they are rendered, are only evidence in a sister state that the subject matter of the suit has become a debt of record, which cannot be avoided, but by the plea of *nul tiel record*. But we need not doubt what the framers of the constitution intended to accomplish by that section, if we reflect how unsettled the doctrine was upon the effect of foreign judgments, or the effect *rei judicatae*, throughout Europe, in England, and in these states, when our first confederation was formed. On the continent, it was then, and continues to be, a vexed question,* determined by each nation according to its estimate of the weight of authority to which different civilians and writers upon the laws of nations are entitled. In England, it was an open question, having on both sides her eminent equity common law and ecclesiastical jurists. It may still be considered, in England, a controverted question, so far as jurists and elementary writers on the common law are concerned, though the adjudications of the English courts are *prima facie* evidence of the right and matter they purport to decide. In these states, when colonies, the same uncertainty existed. When our revolution began, and independence was declared, and the confederation was being formed, it was seen by the wise men of that day that the powers necessary to be given to the confederacy, and the rights to be given to the citizens of each state, in all the states, would produce such intimate relations between the states and persons that the former would no longer be foreign to each other in the sense that they had been as dependent provinces, and that for the prosecution of rights in courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different states. Accordingly, in the articles of confederation, there was this clause: ‘Full faith and credit shall be given in each of these states, to the records, acts, and

* Well settled since this opinion was written, however, as we considered in the last chapter and nearly on the same basis as our constitutional provision, and by the concurrence of nearly all civilized nations.

judicial proceedings of the courts, and magistrates of every other state.' Now, though this does not declare what was to be the effect of a judgment obtained in one state in another state, what was meant by the clause may be considered as conclusively determined, almost by contemporaneous exposition. For, when the present constitution was formed, we find the same clause introduced into it with but a slight variation, making it more comprehensive; and adding, 'Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof,' thus providing in the constitution, for the deficiency which experience had shown to be in the provision of the confederation; as the Congress under it could not legislate upon what should be the effect of a judgment obtained in one state in the other states. Whatever difference of opinion there may have been as to the interpretation of this article of the constitution, in another respect, there has been none as to the power of Congress under it, to declare what shall be the effect of a judgment of a state court in another state of the Union. Here, again, we have contemporaneous legislative interpretation of the first section of the fourth article of the constitution; for, by the act of 1790, May 26, it was declared 'that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage, in the courts of the state from whence the said records are or shall be taken.' What faith and credit, then, is given in the states to the judgments of their courts? They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be, and consequently are conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered. In other words, as has been said, by a commentator upon the constitution: 'If a judgment is conclusive in the state where it is pronounced, it is equally conclusive everywhere, in the states of the Union. If re-examinable there, it is open to the same inquiries in every other state.'

(Story.) It is, therefore, put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the merits of the claim or subject-matter of the suit. When, therefore, this court said, in *Mills v. Duryee*, 'if it be a record conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*,' this language does not admit of the interpretation that a plea not denying the judgment, but which resists it upon the ground of a release, payment, or a presumption of payment from the lapse of time, whether such presumption be raised by the common law prescription, or by a statute of limitation, may not be pleaded, any more than where this court, in *Hampton v. McConnell*, 3 Wheaton, 234, says, 'the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state court where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any court in the United States,' [it] is intended to exclude such defenses as have just been stated, or such as inquire into the jurisdiction of the court in which the judgment was given to pronounce it, as the right of the state itself to exercise authority over the persons or the subject matter. It has been well said: 'The constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state.' Story's Com., 183."³

SEC. 520. I have already said that the United States courts are not to be regarded as foreign to the state courts. Hence, although they are not embraced in the terms of the constitutional provision, nor of the legislation of Congress enacted to carry that provision into effect, yet they must be regarded as coming within the scope and intent thereof, and, therefore, as being included. On this, the Mississippi Court say: "The judgment of a court of the United States is not, in terms,

³ *McElmoyle v. Cohen*, 13 Pet., 324-327.

embraced in the act of Congress regulating the mode of authentication of judgments of the several state courts. The several states are each sovereign and independent, and their relations are those of *foreign states in close friendship*, in regard to all matters not surrendered to the general government. (1 Greenleaf Ev., 565.) But for the act of Congress, the judgments of each state would be regarded as foreign judgments in every other. The judgments of the courts of the United States must be construed to be embraced in this act, or must be esteemed as foreign judgments, when offered as evidence in the court of a state other than that in which they were rendered. In either case, an authentication of the clerk's certificate is necessary. The only ground upon which any other construction could rest, is the assumed consolidation of all the states in reference to the judicial system of the general government. This was not contemplated by the constitution."*

SEC. 521. An inquiry may arise as to the nature of the judgments so provided for. For instance, does the constitutional article include criminal convictions, or not? It is held in Massachusetts, that it was not the intention to embrace such; so that if one is rendered infamous in another state and thus disqualified as a witness therein, the record of conviction cannot be used against him so as to disqualify him from testifying even in a capital case. The court very conclusively reasons on this matter, thus: "It is to be supposed that when the people declared in the constitution that full faith and credit should be given to the judgments of each state, respectively, they must have intended such judgments as could by the aid of courts of states other than those in which they were rendered be carried into execution and effect, as may be done with respect to judgments in all civil actions. But it is manifest that a judgment on a criminal prosecution cannot be carried into effect beyond the jurisdiction of the state within which the offense was committed, or if this might be done by virtue of any act of Congress founded upon such a construction of

* *Dorseg v. Maury*, 10 S. & M., 300.

the constitutional provision, it is clear that such power has never been challenged, and it is hardly possible to conceive that such a construction will ever be adopted, so long as any portion of sovereignty remains with the states; for, the right and duty of punishing offenses must necessarily be limited to the authorities against which the offenses have been committed.

* * * * This will readily be admitted in regard to any direct effect of such judgments upon the persons of such fugitives as may be found within our territory. No one supposes that they can be proceeded against, and punished either in their persons or property, in virtue of any judgment which may stand against them in the state from which they fled. Why, then should they be collaterally affected by the consequences of any such judgment? A disparagement of character, and incompetency to testify, are a part of the punishment of crime, either at the common law, or by statute. If the penalty does not extend beyond the jurisdiction against which the crime was committed, then incompetency, which is the effect and consequence of crime and part of the penalty, cannot reach beyond the limits of the state whose laws have been violated. It has, however, been said, that it is the infamy which takes away the right to testify, and that, the fact of infamy, being proved by the record of the conviction and judgment, is incontrovertibly established, and, therefore, incompetency must follow. But if, by the constitution of the United States, the faith and credit to be given to a record of a judgment of another state has no relation to criminal proceedings, then it has been shown that such record cannot be received to exclude a witness. If it should be provided by the laws of New York that a person convicted of bribery at an election should be disfranchised, and one thus convicted should remove into this state, and reside here the term provided in our constitution to make him an elector, could he be deprived of this privilege on account of such conviction? Certainly not; because the penal laws of one state do not extend into any other; and yet, if such conviction had the same effect here as in New York, such would be the con-

sequence."⁵ But the contrary has been held in North Carolina; and the court gives a metaphysical, rather than political, or judicial reason for it. And as I have given the reasoning of the Massachusetts court, in support of what I regard as the true theory, it is but fair that I should give the other side also, that my readers may judge for themselves; especially as the matter as yet must rest on reason since there are not decisions enough to constitute a general precedent. The court say: "That rule of the common law which renders a person incompetent to give evidence in a court of justice who has been convicted of an infamous offense, is not the consequence of an artificial system, or a state of society peculiar to certain communities, but is founded in the constitution and nature of human associations, generally, and is dictated by the necessity universally felt of maintaining the purity of the institutions through which justice is administered. A man who stands convicted of falsehood by a tribunal having competent jurisdiction of the offense, is deprived of the common presumption raised by law in favor of witnesses, that they will tell the truth; he can no longer be confided in, when he deposes to facts and circumstances affecting the rights of others; and, therefore, the law, that the stream of justice may not be polluted, will not suffer such a witness to be heard. The objection attaches to his state or condition; which, whenever it is necessary to be considered in relation to its influence on the security of others, may be taken, with propriety, if no technical rules interpose to prevent it. For the subject itself is of a moral nature, independent of the conventions of men; and, as truth and justice are not confined by geographical limits, but are co-extensive with the concerns and relations of civilized communities, the crime which in reason renders a witness incompetent in one country, must do so in all. The principle of the exclusion is universal, and ought to be binding everywhere, though it may have peculiar modifications stamped upon it according to the usages and manners of different nations. In some shape or other, witnesses have been deemed incompetent on a conviction of certain

⁵ *Commonw. v. Green*, 17 Mass., 546

crimes, in every civilized state; a coincidence of sentiment and practice which can only be ascribed to a correct influence from a principle of natural justice."

Now this eloquent passage as a piece of moral philosophy is thoroughly orthodox and sound to the core. Yet it seems to take for granted that a person convicted of an infamous crime cannot tell the truth, and cannot reform. But in some states, as Illinois, the legislatures have, by statute, abolished the infamy and incompetency resulting from conviction for crime. The fact may be used against credibility, but not otherwise. This places the impeachability of all witnesses where it appropriately belongs, namely, on actual moral character. And no other line seems to be practicable, while it is the case, necessarily, that our worst villains instead of going where they belong persistently remain outside of prison walls. If the matter of *legal* incompetency rests on *moral* grounds alone, what if there should be a pardon by the executive? This would not change the moral character of the individual, certainly, although it would remove the incompetency. If *public policy* be the true ground of exclusion, then the question to be settled is, how far does this public policy extend, under or by our laws? — which brings us at last to the letter and spirit of the constitutional provision. The court, however, proceeds to expound this also in accordance with its views above expressed, and says: "The faith and credit which would be given to this record in the state of Tennessee, must also be given to it in this state, and being exhibited here, it shows that Garth has been convicted of a crime, which, according to the laws of both states, renders him an incompetent witness. When the act of Congress made it a record, and prescribed the manner in which it should be authenticated, it is equivalent to a record proved by inspection of a court of its own record, or an exemplification in any other court of the state where the judgment was pronounced. *

* * * That a witness who, if he were offered in Tennessee to charge another with a dollar, would be rejected there, should be admitted here to affect life and character, that he should be received here in the state courts and rejected in the

federal courts, and that, in a country where so many motives impel the citizens to explore new regions, they may be followed and judicially destroyed by persons on whom the law of their native state has set a note of infamy, are effects of so mischievous a character as to be averted, if legally possible." HARDESON, J., in confirmation of this, says, though not so eloquently: "The issue in this case being directly upon the affirmation of the record (the moral depravity of the witness), goes to the court, and the record directly establishing that fact which by our law renders him incompetent, he should have been rejected. In doing this, we are not enforcing the penal laws of other states, nor the penal laws of our own state, for this is inflicting no punishment on the witness, but are simply carrying our own laws into execution, which declare that persons who have been guilty of the *crimen falsi* are entirely unworthy of belief, and we take, as evidence of such fact, the judicial proceedings of our sister state which the constitution of the United States declares shall have full faith and credit in each state. If the exclusion of men convicted of such acts from giving evidence were a punishment, then he ought to have been received, for truly he has not offended against the laws of this state; and we, therefore, have no right to punish him. But it is a duty which we owe to those who are to be affected by the judgments of our courts that the courts should be kept clear of such depravity, and that no proceedings should be founded on it. It is asked, what if the governor or proper authority of Tennessee should have pardoned him? That question has not arisen in this case; but as we trust to the judicial proceedings of Tennessee to fix the fact of his guilt, perhaps we should also trust to the proper authority in doing it away, for some proper cause; for that there was a proper cause is a legal presumption which cannot be controverted, either here or there."⁶

This is forcible, but yet, I think the weight of reason remains decidedly with the Massachusetts court, that inasmuch as the *legal credit* of a criminal judgment cannot be carried out as a civil judgment can, and as incompetency is a

⁶ *State v. Candler*, 3 Hawks., 397. HALL, J., dissenting.

legal consequence of conviction, and, therefore, a part of the legal penalty, not dependent upon the conviction merely as *evidence of moral corruption*, but as an *efficient cause* inflicting the disqualification in the way of punishment directly, the nature of the case requires that the constitutional article and the pursuant act of Congress should be held not to include it.

SEC. 522. Yet, in a *qui tam* action, or other penal action, where the judgment is for the payment of a definite sum of money, the judgment is enforceable in another state.⁷ But, in such a case, a cause of action occurring in another state cannot be made the original basis of a suit in the domestic tribunal, at least in matters of internal police, and of an exclusively local nature.⁸

SEC. 523. Are the decrees of a court of chancery included in the act of Congress and the constitutional requirement? There can be no reason why they should not be, in all cases where the decree is for the payment of a sum of money. And where an action of debt at law was brought in a Circuit Court of the United States upon such a money decree, rendered by the Supreme Equity Court in the state of New York, it was maintained by counsel that such an action did not lie. But the action was, nevertheless, held proper by the United States Supreme Court, and the court said: "We will first examine the correctness of the general position that an action at law cannot be maintained upon a decree in equity, and will, in the next place, inquire how far the jurisdiction of the court pronouncing this decree, and the efficiency of its proceedings with reference to the parties before it, may be inferred or rightfully taken notice of, from its style or character, or from proper judicial knowledge of the subject-matter of its cognizance, independently of a particular special averment. We are aware that at one period courts of equity were said not to be courts of record, and their decrees were not allowed to rank with judgments at law, with respect to conflicting claims of creditors, or in the administration of estates; but these opinions, the

⁷ *Healy v. Rost*, 11 Pick., 389; *State of Indiana v. Helmer*, 21 Iowa, 370.

⁸ *Graham v. Monsergh*, 22 Vt., 543.

fruits of jealousy in the old common lawyers, would now hardly be seriously urged, and much less seriously admitted, after a practice so long and so well settled as that which confers on courts of equity, in cases of difficulty or intricacy in the administration of estates, the power of marshalling assets, and in the exercise of that power the right of controlling the order in which creditors, either legal or equitable, shall be ranked in the prosecution of their claims. The relative dignity of courts of equity and the binding effect of their decrees when given within the pale of their constitution and jurisdiction are no longer subjects for doubt or question. We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court, solemnly and finally pronounced, is to every intent, as binding as would be the judgment of a court of law upon parties and their interests regularly within its cognizance. It would follow, therefore, that wherever the latter, received with regard to its dignity and conclusiveness as a record, would constitute the foundation of proceedings to enforce it, the former must be held as of equal authority. These are conclusions which reason and justice and consistency sustain and an investigation will show them to be supported by express adjudication. It is true, that owing to the peculiar character of equity jurisprudence there are instances of decision by courts of equity which can be enforced only by the authority and proceedings of these courts. Such, for example, is the class of cases for specific performances; or wherever the decision of the court is to be fulfilled by some personal act of a party, and not by the mere judgment of an ascertained sum of money. But this arises from the nature of the act decreed to be performed, and from the peculiar or extraordinary power of the court to enforce it, and has no relation whatsoever to the comparative dignity or authority between judgments at law and decrees in equity. We lay it down, therefore, as the general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money

awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with, and responded to, as of the same dignity and binding obligation with the record in the other.”⁹ Hence, where a party is defeated on a bill in equity in one state, he cannot be allowed to re-litigate the matter in another state.¹⁰

SEC. 524. What force has a judgment or decree in one state as to lands lying in another state? It is plain that such a judgment or decree cannot have any force extra-territorially *propria vigore*, and directly. Justice STORY, in his Conflict of Laws, § 543, with his usual clearness and terseness, says hereon: “Although every nation may thus rightfully exercise jurisdiction over all persons within its domains, yet we are to understand that in regard thereto the doctrine applies only to suits purely personal, or to suits connected with property in the same sovereignty, for, although the person may be within the territorial jurisdiction, yet it is by no means true that in virtue thereof every sort of suit may there be maintainable against him to bind his property situated elsewhere, and *a fortiori* not absolutely so as to bind his rights and titles to immovable property situated elsewhere.” And again, “a foreign court cannot, by its judgment or decree, pass the title to lands situated in another country. Neither can it bind such land by a judgment or decree that in default of the defendants in the suit conveying, it shall be conveyed by deed of its own officers to the plaintiffs. Such a conveyance made by its officers would be treated in the country where the land is situated as a mere nullity.” Hence, no action can be maintained as to a naked question of title. “But when the question changes its character, when the defendant is liable to the plaintiff, either in consequence of contract, or as a trustee, or as the holder of a legal title acquired by any species of *mala*

⁹ *Pennington v. Gibson*, 16 How., 76; *Nations v. Johnson*, 24 How., 203; *Warren v. McCarthy*, 25 Ill., 102.

¹⁰ *Low v. Mussey*, 41 Vt., 393.

fides practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction. The jurisdiction is sustained upon the principle that in all cases in equity the primary decree is *in personam* and not *in rem*, and that, in these cases peculiarly, the courts having authority to act upon the person, may make decrees not binding the land itself but the conscience of the party in regard to the land, and compel him to perform his contract, execute his trust, or answer for the fraud, according to conscience and good faith. In a case for the specific performance of a contract to convey lands, for instance, if the lands lie within the reach of the process of the court, courts of equity, instead of relying exclusively on the proceedings *in personam*, will act upon the thing or property also, and put the successful party in possession, if the other party refuses to comply with the decree." "But," says McLEAN, J., "while a decree cannot operate as a conveyance of land out of the state, as it does under the statute within the state, yet this is a matter that does not affect the jurisdiction. Having jurisdiction of the parties by a voluntary appearance, the court may decide the controversy between them, and such effect may be given to the decree as the law shall authorize. (3 McLean, 522.)"¹¹

SEC. 525. In regard to probate proceedings, it is held, in Massachusetts, that where ancillary administration is taken out in another state as to an estate in Massachusetts, a judgment there rendered is not binding, nor can it be proved against the estate, because the limitation of state jurisdiction makes it imperatively necessary to take out administration in every state where a deceased persons leaves property, and every state has the exclusive regulation of probate affairs within its own limits.¹²

And as to the distribution of assets, no judgment rendered

¹¹ *MacGregor v. MacGregor*, 9 Iowa, 78. ¹² *Low v. Bartlett*, 8 Allen, 263.

in another state can claim any priority whatever, but is to be regarded merely as a simple contract debt, as to this particular; for there is nothing in the constitution or laws of the United States to hinder any state from giving preference to its own judgments in allowing demands against the estates of decedents.¹³ And a decree for dower in another state will be regarded as only embracing lands in that state, and the personal estate of a person dying in another state must be administered by one acting under the control of the courts, and according to the laws of the state wherein the property is situated, although a court may, from comity, adopt the laws of the domicile as to the payment of legacies and distributive shares.¹⁴ But as to the judgment of debits, the domestic creditors will be preferred, and the assets therein will be administered according to the domestic law, so that the judgment of another state, conclusive between the parties there, and having priority over bonds, bills, and simple contract debts in the state where rendered, as to the assets of the defendant in the hands of his executor, will, nevertheless, be classed only as a simple contract debt in the distribution of assets elsewhere. The Maryland Court, in a case of the kind, where the court below held that a judgment of another state stood on the same footing as a domestic judgment, and was therefore entitled to the same priority, characterized this doctrine of the lower court as pregnant with mischievous consequences, which, "in its tendency and operation, might lead to a conflict and collision between the laws of the different states in the administration of their internal policy and domestic concerns; and it would, in effect, put it in the power of one state to pass laws to regulate and control the administration of assets in another state; which would be an anomaly in jurisprudence, and a violation of the genius and spirit of all our institutions. Strikingly to illustrate the glaring injustice and unreasonable operation of such a doctrine, it is only necessary to suppose that by the laws of

¹³ *Harness v. Green's Adm'r*, 20 Mo., 316.

¹⁴ *Jones v. Gerock*, 6 Jones Eq., 190.

this state a legal administration of the assets would distribute the same *pari passu* among all the creditors. Could it be tolerated that a judgment of a sister state, where a different rule prevails, should come and sweep away the whole of the assets to the total exclusion of all the home or domestic creditors? And yet such might be the operation of the principle, when practically enforced and carried out to all its legitimate consequences.”¹⁵

And so, in regard to realty, since the conveyance of real estate must be made according to the law *rei sitæ* which alone can regulate the mode of passing title, a will made and probated in another state, or in a foreign nation, cannot pass title, usually, unless the will be probated also in the state wherein the land lies, and in conformity with its laws.¹⁶ However, in some states, it is provided by statute, that a foreign probate will be received, if duly authenticated, and the will be thereon admitted to record.¹⁷ Where a statute so provides, the filing and recording in the manner prescribed, will have the same force and effect as a probate in the domestic court,¹⁸ and so will pass real estate.¹⁹

SEC. 526. A case arose in the United States courts, involving the question whether an action of debt would lie against an administrator in one state on a judgment obtained against another administrator of the same intestate appointed in another state. And it was decided in the negative, on the ground that there is no privity between such administrators, although there is a privity between each and the intestate whom he represents. The Supreme Court say: “An administrator, under grant of administration in one state, stands in none of these relations to an administrator in another. Each is privy to the testator [or intestate], and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate.

¹⁵ *Brengle v. McClellan*, 7 Gill & J., 442.

¹⁶ *Crusoe v. Butler*, 36 Miss., 150, and cases cited.

¹⁷ *Townsend v. Moore*, 8 Jones, 149.

¹⁸ *Dublin v. Chadbourne*, 16 Mass., 440.

¹⁹ *Tompkins v. Tompkins*, 1 Story, 547

They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts, as in the case of an administrator *de bonis non*, who may be truly said to have an official privity with his predecessor in the same trust, and therefore [to be] liable to the same duties."²⁰ But this applies only to administrators, and not to executors qualifying in different states, because, as to the latter, there is a privity between them by the express appointment made by the testator himself; although this privity is limited, so that a judgment against one executor would not be conclusive against another qualifying in another state, but only admissible evidence to show that the demand had been carried into judgment as a debt due by the testator, and to exclude the plea of the statute of limitations upon the original cause of action,²¹ which would be available even to an administrator against whom a recovery in another state is not evidence.²²

In the absence of a special statute, an administrator appointed in one state cannot sue, or be sued, in the courts of another state.²³ And, accordingly, it has been held in Massachusetts, that where an administrator brought an action in a court of that state, he having been appointed in Rhode Island, and obtained a judgment therein by default, and issued execution thereon, which was levied on the debtor's real estate, and returned satisfied, even this payment would not bar an action brought on the same demand by an administrator duly appointed in Massachusetts.²⁴ Of course, it is different where there is a statute allowing such foreign administrator to sue on filing his

²⁰ *Stacy v. Thrasher*, 6 How., 59. Justices McLEAN & WAYNE, dissenting.

²¹ *Hill v. Tucker*, 13 How., 467.

²² *McLean v. Meek*, 18 How., 16.

²³ *Borden v. Borden*, 5 Mass., 76.

²⁴ *Pond v. Makepeace*, 2 Met., 114.

letters of administration in the court where suit is to be brought. Nor can an administrator, in the absence of such statute, be allowed to interfere with a suit commenced by a domestic administrator.²⁵

In New Hampshire, it is held, on the ground that there is no legal privity between administrators appointed in different states, that where commissioners appointed on an insolvent estate in another state, reject a claim of a non-resident creditor, the rejection is no bar to the presentation of the claim where the creditor resides.²⁶ But where such a claim was allowed by the commissioner, the administrator appealed from the decision successfully, and it was held that, if presented in another state, the ancillary administrator might plead this former judgment in bar;²⁷ although the court acknowledged the general principles above stated, and also that the ancillary administrator as such could not bring suit on a judgment recovered by the principal administrator.²⁸

In Illinois, it is held that where a judgment rendered in another state against an executor is presented as a claim, it is only *prima facie* evidence of the claim, and therefore may be examined on the merits. It is held, also, that a citizen of another state where administration has been granted, may come to Illinois, cause administration to be taken out, his claim to be allowed, and real estate to be sold for its payment. And in such case he needs not to show that the personal assets have been exhausted in the original administrator's hands.²⁹

As to the probate of wills of personal property, the sentence of the proper court is conclusive elsewhere, because such property is regarded as following the person of the owner so far as that the *lex domicilii* governs it;³⁰ although it must appear in such case from the record that the will was duly passed upon

²⁵ *Chapman v. Fish*, 5 Hill, 554.

²⁶ *Taylor v. Barron*, 35 N. H., 484.

²⁷ *Goodall v. Marshall*, 14 N. H., 169.

²⁸ *Talmage v. Chapel*, 16 Mass., 73.

²⁹ *Rosenthal v. Renick*, 44 Ill., 202.

³⁰ *Williams v. Saunders*, 5 Cold., 76; *Tompkins v. Tompkins*, 1 Story, 547.

by the proper court, and that such tribunal was the court of the domicile.³¹

SEC. 527. In regard to garnishment proceedings in another state, it has been held, in Massachusetts, that payment of an execution issued upon a judgment in another state charging a trustee in foreign attachment, will not avail him in the domestic tribunals as a bar to an action brought against him by his immediate creditor, if, in his answer to the garnishment suit, he denied a fact, which, if disclosed, would have prevented his being charged by the law of the state where the judgment was rendered, or if, even, he withheld facts available in defense, as, for instance, if he had knowledge of the transfer of the claim before service on him.³² Such a case is regarded as collusive, whether so intended or not. But if a disclosure is truly made, and then he is charged, he is not required to appeal the case, it being held that he may justly and properly acquiesce in the primary decision; which, will therefore, protect him.³³ However, the judgment will not avail unless he has either paid it, or will inevitably be obliged to pay it.³⁴ In Vermont, it is held, that in case of a transfer happening, of which notice was given to him after the trustee summons had been left at the residence of the debtor but before actual knowledge of the service had reached him, he could not plead the fact of the transfer as a defense, and so, was chargeable to the plaintiff in garnishment.³⁵

In New York, it has been decided, that payment by a garnishee under a judgment and execution, on a proceeding by foreign attachment in the Lord Mayor's Court of London, of a debt due by a citizen of New York to a London creditor, being compulsory and not voluntary, was a bar to an action in New York against the debtor under the act providing relief against absent and absconding debtors, although the home attachment was issued before the London attachment, and before the money of the debtor came into the hands of the

³¹ *Townsend v. Moore*, 8 Jones, 147. ³⁴ *Meriam v. Rundlett*, 13 Pick., 511.

³² *Wilkinson v. Hall*, 6 Gray, 569. ³⁵ *Barney v. Douglass*, 19 Vt., 98.

³³ *Hull v. Blake*, 13 Mass., 157.

garnishee.³⁶ And so, an attachment *pending* in another state is pleadable in abatement³⁷ of course except as to an assignee.³⁸

A judgment against a garnishee is not collaterally impeachable in another state, on the ground that the garnishee was not a resident of the state where the judgment was rendered on personal service upon him, when it appears that the court in passing upon the case determined that very question against the garnishee.³⁹

SEC. 528. It is evident that the provision of the constitution and the act of Congress do not necessarily include, in terms, the proceedings of inferior courts, but they are, doubtless, intended to have like credit, when properly authenticated; but it is held that the decision of an inferior tribunal which does not admit of such authentication as the law requires is only *prima facia* evidence—as, for example, commissioners of an insolvent estate;⁴⁰ or, as held in New Hampshire, a justice of the peace,⁴¹ concerning which it is held that the ordinary rules of authenticating records of foreign courts of independent nations are alone available;⁴² that is, by a certificate of the justice alone, he having neither a clerk, nor a seal, and then this judgment, so certified has been held but *prima facie* evidence.⁴³ In Vermont, and probably this is the general rule, the certificate must be accompanied by proof that he is a justice of the peace,⁴⁴ which may be shown by the certificate of a court having a seal. In Vermont it is now held that the judgments of a justice of the peace in another state are conclusive where they are manifestly rendered within jurisdiction, nor is it any objection to the binding effect of such judgments that suit was commenced by the parties voluntarily, without previous process, going before the justice, joining issue, and obtaining a trial thereon, where such a proceeding is consonant with the laws of the state wherein they occur.⁴⁵ Commenting

³⁶ Holmes v. Remsen, 20 Johns., 229.

⁴¹ Robinson v. Prescott, 4 N. H., 450.

³⁷ Embree v. Hanna, 5 Johns., 101.

⁴² Mahnin v. Bickford, 6 N. H., 570.

³⁸ Prescott v. Hull, 17 Johns., 284.

⁴³ Chipman (Vt.) 59.

³⁹ Gunn v. Howell, 35 Ala., 162.

⁴⁴ Blodgett v. Jordan, 6 Vt., 580.

⁴⁰ Taylor v. Barron, 10 Fost, 78.

⁴⁵ Carpenter v. Pier, 30 Vt., 81.

upon the variant decisions of the states passing on the question — some holding that such judgments can only be proved under the common law mode, and others that they are included within the constitutional provision, the court say: "In 1830, in *Starkweather v. Loomis*, 2 Vt., 573, the decision in Chipman's reports was directly overruled. The court say: 'That decision was made before the subject had undergone so much investigation in the several states as has occurred since that time. But when the subject came to be examined, upon principle, and in connection with the statutes that give large jurisdiction to justices, this court felt constrained to decide that though a justice has no clerk, yet where law requires him to keep records, he must be considered as his own clerk, and if he has no seal he may use a common seal, or may certify that he has no seal of office, as an excuse for omitting to attach one to his copies of record.' This decision was referred to, and confirmed in *Blodget v. Jordan*, 6 Vt., 580, and may be regarded as the settled law of this state. The conclusive effect of a judgment as evidence rests upon the authority of the court, upon its acting within its jurisdiction, and upon the policy and necessity of determining by law the end of controversy. These reasons apply to the judgments of justices of the peace, as well as to any others. The argument that as justices have no clerks, or seals, and cannot authenticate records in the mode prescribed by the act of Congress, therefore their judgments are not entitled to full faith and credit, seems to rest upon the manner in which the court is organized, and its inability to comply with a particular form of authenticating its records, rather than upon the broader and more solid ground of the authority and jurisdiction of the court, and the interest of the community that there should be an end to litigation." In this, there is, doubtless, at the present time, a general, if not a universal, concurrence. Thus, in Ohio, this doctrine has superseded the earlier opinions, and it is now held that although the judgment of a justice of the peace is not within the act of Congress — this court not being a court of record — yet it is

within the constitutional provision.⁴⁶ Pennsylvania seems to adhere to the old theory.⁴⁷ But I do not know of any late decisions on the subject there.

SEC. 529. Where a judgment was rendered in a state, and on this judgment another judgment was rendered in another state, and afterwards the plaintiff returned to the original state and commenced an action of debt on the first judgment, it was held that the second judgment, so rendered in another state, could not be set up as a bar to the action. The court said: "The reason why a former recovery for the same cause is a bar to a second action, is, that the cause of action has passed in *rem judicatam*, and is determined by the judgment. But this reason does not exist where there has been a recovery in another state in debt upon a judgment recovered here. For one judgment being of as high a nature as another, a judgment in another state cannot extinguish, or determine, a judgment rendered here, and we see no ground on which it can be held that the recovery in New York upon this judgment, is a bar to this action. This question has long been settled. In *Preston v. Perton*, Cro. Eliz., 817, Preston recovered judgment in the Court of King's Bench against Perton, and afterwards brought debt upon the judgment in the common pleas, and had judgment there. He then brought *scire facias* in the King's Bench to have execution upon the first judgment. The defendant pleaded in bar the recovery in the common pleas, to which there was a demurrer and all the court held it to be no plea, because one judgment cannot determine another judgment which is of equal nature."⁴⁸—so that there can be no merger as there is in regard to a cause of action passing into judgment.

SEC. 530. Of necessity, on the ordinary principles of *res adjudicata*, a judgment rendered in one state must bar a suit on the same cause of action subsequently begun or prosecuted in another state. Even where the action in the other state is

⁴⁶ *Stockwell v. Coleman*, 10 Ohio St., 33.

⁴⁷ *Snyder v. Wise*, 10 Pa. St., 157.

⁴⁸ *Weeks v. Pearson*, 5 N. H., 325.

begun after the one in the domestic tribunal, and there is personal service and judgment thereon, it will be a bar to the action first begun but still pending.⁴⁹ The mere *pendency* of an action in another state will not, of course, work an abatement, but a judgment actually rendered in one state by a court having jurisdiction merges the cause of action, and is a bar to another suit in another state, even without satisfaction,⁵⁰ and rendered during the pendency of the other action;⁵¹ and it is not a sufficient replication to the plea thereof that the plaintiff had caused the defendant's property to be attached in the jurisdiction of the domestic tribunal, and that the defendant's property in either state alone is not sufficient to satisfy the demand⁵²—the merger being as absolute as it would be in the same state.⁵³ But it is held that in a strictly foreign suit, the same rule does not apply throughout, so that a judgment recovered in Canada will not bar a suit in Massachusetts on the same cause of action, if the latter was first commenced, unless the foreign judgment is satisfied; when it will be a bar, the debt being of course extinguished by the payment.⁵⁴

In Connecticut, the defendant pleaded in abatement, in an action of account; that, before the commencement of the action, the plaintiff and defendant then both being citizens of New York, the plaintiff brought a bill in equity before the Supreme Court of the State of New York; that the defendant being duly served with a subpœna had appeared, and filed his answer in the cause; that the bill was still pending before a court having jurisdiction, both of the subject-matter and the parties, so that a judgment therein would be conclusive in the action of account between the parties, and, moreover, that, in the action wherein the plea in abatement was filed, the defendant was served with process while merely passing through the state. It was held, that the plea was bad, because although

⁴⁹ *North Bank v. Brown*, 50 Me., 214.

⁵⁰ *McGilroy v. Avery*, 30 Vt., 538.

⁵¹ *Rogers v. Odell*, 39 N. H., 452.

⁵² *Child v. Powder Works*, 45 N. H., 547.

⁵³ *Baxley v. Linah*, 16 Pa. St., 249.

⁵⁴ *Wood v. Gamble*, 11 Cush., 8.

where two suits, in all particulars alike, are pending in the same jurisdiction, the one commenced after the other shall abate, yet the rule does not extend to different jurisdictions, nor even to cases in the same jurisdiction pending in a court of law and a court of equity, since the *nature* of the remedies and modes of procedure are unlike in the two courts.⁵⁵ It is only a judgment actually rendered of which the courts of another state will take cognizance, and not merely initiatory steps towards obtaining a judgment. Yet it has been held differently, in New York, but, as I think, contrary to the weight of authority. Thus, where a resident of Maryland was indebted to a firm which dissolved, one of the partners assigning his interest to the other, afterwards a creditor of the purchasing partner attached the Maryland debtor. Subsequently to the levying of this attachment, the debtor was sued by the firm in New York, for the same debt, and it was held that the Maryland attachment was pleadable in abatement therein.⁵⁶ This case, however, may be only an *exception* to the general rule, arising from the nature of an attachment and the relation of a mere garnishee; for the subsequent cases in the same court recognize the usual English and American doctrine that the mere pendency of a suit is no bar to another suit elsewhere, under a distinct sovereignty.⁵⁷ And in the same jurisdiction, according to the doctrine in that state, if the two suits are commenced at the same time, one cannot be pleaded in abatement of the other.⁵⁸ Also, a suit cannot be abated by a plea that another action for the same cause was afterwards commenced in the same jurisdiction, although a judgment recovered in the second suit while the first is still pending will bar a recovery therein.⁵⁹

In Maryland, it seems to be the doctrine that the pendency

⁵⁵ *Hatch v. Spofford*, 22 Conn., 493.

⁵⁶ *Embree v. Hanna*, 5 Johns, 102.

⁵⁷ *Browns v. Joy*, 9 Johns, 221; *Walsh v. Durkin*, 12 Johns, 99; *Percival v. Hickey*, 18 Johns, 257.

⁵⁸ *Haught v. Holley*, 3 Wend., 262.

⁵⁹ *Nicholl v. Spaulding*, 21 Wend., 339.

of a prior suit in another state is a good plea in abatement,⁶⁰ contrary to the general rule that only the actual rendition of judgment in the foreign jurisdiction will destroy the suit in the home jurisdiction by destroying the cause of action in the way of merger,⁶¹ which principle applies as well to a suit in equity as to an action at law,⁶² and to a United States court as well as to a state court.⁶³

SEC. 531. According to the constitution, the faith and credit to be given to the judgments of sister states is to be gauged and determined by the faith and credit to be given them at home. This necessarily implies that all other courts have a right to inquire into the character and effect of such judgments where they are rendered. For example, if it be so that where only one joint defendant is served with process judgment cannot be taken against him for want of service on the others, proof may be required, in an action on the judgment rendered thus in another state, that such judgment might properly be rendered by the laws of such other state; for a court cannot judicially know that the law of such other state differs both from the common law and the statute law of the state where the judgment is sued on, and *e converso*.⁶⁴ And so, where suit was brought on a firm note, and judgment obtained against *one* of the partners, and afterward the note was sued against the firm in another state, the court said: "When the plaintiffs elected, under the provision of the statute of Ohio, to proceed to judgment on the note against Brown alone, they voluntarily and legally released their security on the note as to Clark; hence, the judgment is a merger of the plaintiff's entire claim. Such must necessarily be the legal effect of their proceedings in that court under the statute of that state. The judgment in that court is not a nullity, nor can it be judicially so regarded. It would, indeed, be most

⁶⁰ *Bank of U. S. v. Merchants' Bank*, 7 Gill., 415.

⁶¹ *Barnes v. Gibbs*, 31 N. J., 317.

⁶² *Brown v. R. R.*, 2 Beas, 191.

⁶³ *R. R. v. Wynne*, 14 Ind., 386.

⁶⁴ *Knapp v. Abell*, 10 Allen, 490.

extraordinary if the plaintiffs after having recovered a judgment on the note could at will repudiate it and treat it as a nullity for the purpose of prosecuting the same demand to judgment a second time”⁶⁵—thus estimating the force of the judgment by the statute of the state wherein it was rendered. And it is a settled principle that the judgment of a court cannot have elsewhere any other or greater force or effect than it has in the state wherein rendered, so that where a statute provides that all contracts which are joint only by the common law shall be construed as joint and several, and thereunder a judgment is recovered against one of several joint obligors, that judgment does not discharge the original obligation as to the co-debtors not sued, and, therefore, they cannot avail themselves of it when afterward sued on it in another state.⁶⁶ And so, where such a judgment was recovered and afterward a compromise was made wherein the judgment debtor gave the plaintiffs a bond, under seal, providing that although the judgment should then be satisfied of record, yet this satisfaction should not be deemed payment of the debt unless the installments should be paid at maturity, and that, in default of such payment, the amount paid should be credited, and the whole residue of the judgment should remain due, and the debt evidenced by the judgment should remain in full force until all the installment notes were paid, it was held that although no default was made in such payment, yet these facts constituted no defense to a subsequent action in another state against the other joint debtors upon the original cause of action.⁶⁷ Where joint debtors reside in different states, especially, service being impracticable on the absentees, a judgment rendered against one is *ex necessitate* no bar to another against another joint debtor in a different state.⁶⁸

In Missouri, it has been held that a warrant of attorney dated in Pennsylvania, and afterward passing into judgment in New Jersey, will support that judgment though neither of

⁶⁵ *Candee v. Clark*, 2 Mich., 257.

⁶⁷ *Rerd v. Girty*, 6 Bosw., 567.

⁶⁶ *Suydam v. Barber*, 18 N. Y., 469.

⁶⁸ *Brown v. Birdsall*, 29 Barb., 551.

the parties were ever in the latter state — the warrant empowering “any attorney of any court of record in the United States to confess judgment” against the defendant, and such judgment being allowed by the laws of New Jersey;⁶⁹ and also that a judgment of a sister state appearing to have been rendered by the court upon a confession made before the clerk in vacation is conclusive.⁷⁰

SEC. 532. It has been held in Maine that a *scire facias* against one who had been charged as trustee in a process of foreign attachment is only a continuation of the original suit, or an incident to it, and not a new suit, and inasmuch as the laws of Massachusetts provide that such a writ is sufficiently served by the officer’s leaving a copy of it at the last and usual place of abode of the trustee in that state, such a service made after the removal of the trustee to another state will authorize judgment in the courts of Massachusetts, which will be conclusive in Maine when sought to be enforced there.⁷¹ And so in Ohio, it has been held that where the record of a judgment in Pennsylvania was destroyed by fire, and afterward, according to the laws of that state, the judgment was revived, and the record supplied by *scire facias*, the supplied record could be enforced in Ohio against the surety of the original debtor.⁷²

SEC. 533. It is not competent for a defendant to show, even from the face of the record of a judgment rendered in another state, that the facts stated were not sufficient to constitute a cause of action, nor that the cause of action arose in the state where the judgment was sued on, and is one which could not be recovered on in that state.⁷³ The definite rule is that whatever pleas would be good in a suit on the judgment where rendered can be pleaded in any other court within the United States, and such only.⁷⁴ And so no plea or proof can be received in contradiction of any material fact appearing by

⁶⁹ *Randolph v. Keiler*, 21 Mo., 557.

⁷⁰ *Harness v. Greene's Adm'r*, 19 Mo., 323.

⁷¹ *Adams v. Rowe*, 2 Fairf., 89.

⁷² *Poorman v. Crane's Adm'r*, Wright, 347.

⁷³ *Phillips v. Godfrey*, 7 Bosw., 150.

⁷⁴ *Hampton v. McConnel*, 3 Wheat., 234.

the record unless such plea or proof would be received in an action on the judgment in the court in which it was rendered.⁷⁵ And, on the other hand, any state of facts which would be sufficient to avoid the judgment where rendered, may be set up in defense elsewhere.⁷⁶ And so, where a defendant is sued upon a judgment recovered against him in another state by the non-resident executor of a non-resident decedent, on plea of payment made he cannot, in such suit, controvert the character of the plaintiff as such executor, if in the state where suit is brought the testamentary letters are not required to be filed in order to bring the action.⁷⁷ And so, a judgment rendered for a party in another state is conclusive, as to the existence of the party at the date of the rendition.⁷⁸

However, it is held that the faith and credit enjoined do not extend to acts subsequent to the judgment, such as issuing and returning an execution.⁷⁹

A discharge in insolvency is pleadable in any other state.⁸⁰

It cannot be objected that before the institution of the original suit a warrant of attorney was not filed, even if the law required such filing.⁸¹

And, in New York, it is held that where the grounds relied on in the suit on the judgment rendered in another state might have been insisted on, those grounds are barred.⁸² However, it is held, in Kentucky, that a counter claim dismissed for alleged want of prosecution may afterwards be made available in another state.⁸³

And, so, an accident cannot be pleaded, as the sickness of counsel, or personal inability to attend at the trial.⁸⁴

SEC. 534. The Supreme Court of the United States has held

⁷⁵ *Wilcox v. Kassick*, 2 Mich., 165.

⁷⁶ *Rogers v. Gwinn*, 21 Iowa, 59; *Cook v. Thornhill*, 13 Tex., 293.

⁷⁷ *Wayland v. Exec'r*, 1 Met. (Ky.), 638.

⁷⁸ *Cook v.'Bank*, 1 Iowa, 447.

⁷⁹ *Carter v. Bennett*, 6 Fla., 214.

⁸⁰ *Hall v. Winchell*, 38 Vt., 592.

⁸¹ *Rogers v. Burns*, 27 Pa. St., 525.

⁸² *Baker v. Rand*, 13 Barb., 152.

⁸³ *Rankin v. Barnes*, 5 Bush., 20.

⁸⁴ *McFarland v. White*, 13 La. An., 394.

that a state statute is unconstitutional and void as destroying the right of a party to enforce a judgment regularly obtained in another state, which provides that "no action shall be maintained on any judgment or decree rendered by any court without this state against any person who, at the time of the commencement of the action in which such judgment or decree was, or shall be, rendered, was, or shall be, a resident of this state, in any case where the cause of action would have been barred by any act of limitation in this state, if such suit had been brought therein"—for no state can be allowed to enact that a valid judgment of another state shall not have the same credit it has where rendered.⁸⁵

SEC. 535. However, the bearing of a statute of limitation on the *cause of action* is never available in a subsequent action upon the judgment obtained, whether the statute of limitation was actually pleaded⁸⁶ or not. But a limitation applied to the *judgment itself*, and not to the original cause of action, is available, and this is not the limitation either of the state where the judgment was rendered but that of the state where it is sued on, because limitations pertain to the remedy and therefore belong to the *lex fori*.⁸⁷

But, in Ohio, it has been held, that where judgment is rendered in favor of an administrator, on a plea of the statute of limitations, this will not bar a subsequent action in another state by bill in equity to subject subsequently discovered assets to the payment of the debt, because the plea only related to the assets available when the suit was instituted, and the discovery gave a new ground of action, on which a suit could be based, either at home or abroad.⁸⁸

SEC 536. It is a settled rule that errors and irregularities of proceeding in the original cause cannot be made available afterward in another state. And so, there can be no inquiry into the merits of the claim, nor whether the judgment was recovered according to law, although it may be alleged that the

⁸⁵ *Christmas v. Russell*, 5 Wall., 302. ⁸⁷ *McElmoyle v. Cohen*, 13 Pet., 312.

⁸⁶ *Sweet v. Brockley*, 53 Me., 346.

⁸⁸ *Mattoon v. Clapp*, 8 Ohio, 250.

plainest dictates of justice were wantonly violated. Thus, where it appeared that a judgment was rendered in a case where the defendant's counsel had responded to the action, it was held the defendant could not in another state be allowed to prove that he never owed the plaintiff, that he was never a resident citizen, or inhabitant of the state where the judgment was rendered, and that he was by the laws of said state prevented from setting up any defense.⁸⁹ And where a defendant's answer was that at the time of the alleged service of summons he was not a resident, that he was not served with notice, and that he had no attorney, or agent, in the state, authorized to appear for him, or acknowledge service, it was held insufficient without an express denial that he voluntarily submitted himself to the jurisdiction.⁹⁰ Whether it be an error of fact, or of law, in the original proceedings, it cannot avail as defense in another state.⁹¹ And so, an answer averring such error, and reciting the statutes of the state where judgment was rendered on the subject of practice, and even averring that the judgment was rendered on evidence known to be false and perjured, will not be sustained on demurrer.⁹² And the same rules apply to the decree of a court of equity.⁹³ And a court cannot inquire whether judgment was given with or without a jury, or whether evidence was or was not adduced, etc.⁹⁴ And it has even been held that a judgment of a court of competent jurisdiction, although rendered in an unknown form of proceeding as to the practice of another state, and apparently without service of process, cannot be treated as a nullity while unreversed where rendered.⁹⁵

SEC. 537. But the actual want of jurisdiction, either as to parties or subject-matter, may be objected, and it has been held

⁸⁹ *Rocco v. Hackett*, 2 Bosw., 579.

⁹⁰ *Struble v. Malone*, 3 Iowa, 587.

⁹¹ *Milne v. Van Buskirk*, 9 Iowa, 558; *State of Indiana v. Helmer*, 21 Iowa, 370.

⁹² *Riley v. Murray*, 14 Ind., 355.

⁹³ *Hassell v. Hamilton*, 33 Ala., 280.

⁹⁴ *Conway v. Ellison*, 14 Ark., 362.

⁹⁵ *Weyer v. Zane*, 3 Ohio, 305.

that this may be done even in a divorce case where the person obtaining the decree has since married in another state.⁹⁶ Also, it has been held, that where the foreign judgment is joint against several, and it is shown to be invalid for want of jurisdiction over some of the defendants, it will not be regarded as binding upon any, even upon those who appeared and made defense.⁹⁷ But not, if they enter an appearance as to all, it seems, in New York.⁹⁸ And if a defendant, not served in an action for divorce, makes an attempt after a decree is entered against him to set the decree aside, which attempt is defeated on technical grounds only, this will not preclude him from disputing the jurisdiction in another state.⁹⁹ Where one has not been served, and there is a fraudulent appearance on his behalf, he may set up these circumstances although in contradiction of the record,¹⁰⁰ and of course in such case the particular jurisdictional facts, if any are stated in the record, are disputable as well as a mere general affirmation of jurisdiction.¹⁰¹ It has also been held that the record must show either that the defendant was served with process, or else voluntarily appeared in the case.¹⁰² Yet as to courts of general jurisdiction this is certainly not necessary, as their jurisdiction is presumed.¹⁰³ We shall have occasion presently to return to the matter of record recitals.

Usually, where service is good in the state where the judgment is rendered, it will be held good elsewhere, on the question of jurisdiction.¹⁰⁴ Yet a mere constructive service will not be regarded as having a conclusive effect,¹⁰⁵ unless in actions partaking of the nature of proceedings *in rem*; for Congress

⁹⁶ *Kerr v. Kerr*, 41 N. Y., 278.

⁹⁷ *Mackey v. Gordon*, 34 N. J., 289.

⁹⁸ *Reed v. Pratt*, 2 Hill, 64.

⁹⁹ *Hoffman v. Hoffman*, 46 N. Y., 31

¹⁰⁰ *Marx v. Fore*, 51 Mo., 73.

¹⁰¹ *Hoffman v. Hoffman*, *supra*.

¹⁰² *Hockaday v. Skeggs*, 18 La. An., 682.

¹⁰³ *Zimmerman v. Helser*, 32 Md., 278

¹⁰⁴ *Barney v. White*, 46 Mo., 139.

¹⁰⁵ *Rathbone v. Terry*, 1 R. I., 73, and cases cited.

did not intend to declare that a judgment rendered in one state against the person of a citizen of another who had not been served with process, or voluntarily made defense, should have such faith and credit in every other state as it had in the courts of the state where it was rendered.¹⁰⁶ And, where it appears that the judgment is rendered against one not within the state, nor bound by its laws, nor amenable to the jurisdiction of its courts, no faith or credit will be given to it.¹⁰⁷ And so, if jurisdiction is assumed on certain constructive notice, such as a nominal attachment of property, with publication of notice, or by summoning a garnishee, or any such mode, it will not bind him personally, although it may hold such property as is found in the jurisdiction.¹⁰⁸ And, in Massachusetts, it is held, that the return of an officer may be contradicted by parol.¹⁰⁹ A partial acknowledgment, however, of a judgment rendered without service, by a partial payment will be good so far as the payment goes;¹¹⁰ and, if fully satisfied thus, of course, it is a complete bar.¹¹¹

A mere appearance by leave of the court, to move that the action be dismissed, for want of jurisdiction, does not confer jurisdiction on the court.¹¹²

And the constitutional clause applies only *so far* as the court has jurisdiction. In *every particular*, where this is wanting, the judgment rendered is a nullity.¹¹³ On this, the California Court say: "The judgment was sufficient to subject to its satisfaction, within New York, property of the defendant in that state. To that extent, it would be held valid as a proceeding *in rem*, but it has no binding force *in personam* for want of jurisdiction of the person. To the extent in which jurisdiction existed, will faith and credit be given to the judgment

¹⁰⁶ *D'Arcy v. Ketchum*, 11 How., 165.

¹⁰⁷ *Bissell v. Briggs*, 9 Mass., 462.

¹⁰⁸ *Gleason v. Dodd*, 4 Met., 338.

¹⁰⁹ *Carleton v. Bickford*, 13 Gray, 591.

¹¹⁰ *Rangeley v. Webster*, 11 N. H., 299.

¹¹¹ *Whittier v. Wendell*, 7 N. H., 257.

¹¹² *Wright v. Boynton*, 37 N. H., 9.

¹¹³ *Kane v. Cook*, 8 Cal., 455.

in this state, and no further. Thus, if personal property of the defendant had been sold under this judgment, in New York, and the purchaser had brought the property into this state, he would be protected against a claim of the defendant. The judgment and sale thereunder, would sustain his title. But for all the purposes of establishing a personal claim against the defendant, it is a mere nullity, and it makes no difference whether valid and in conformity with the course and practice of the court where rendered, or otherwise." "All agree that a judgment rendered without jurisdiction is utterly void. It is not a judgment; it is a blank, as if it had not been written. It is not a record; and consequently is not admissible in evidence on a plea of *nul tiel record*."¹¹⁴ Yet a court having jurisdiction may pass an erroneous decree which may form the basis of an action in another state. Thus, a bill was filed in Kentucky for a divorce, and the prayer was granted. Subsequently, in Ohio, a court having jurisdiction of the parties, decreed alimony, and afterwards an action was brought in Kentucky on the Ohio decree to recover the amount. The latter action was held maintainable, notwithstanding the decree was erroneous on which it was based. And it was said thereon: "The court of common pleas of the State of Ohio decided that as the claim of the wife to a portion of the husband's estate had not been put in issue by the parties, nor adjudicated upon by the court that granted the divorce, the decree rendered in that case was not a bar to the suit then prosecuted by her. That court, however, did not undertake to re-try any matter that had been litigated in that suit between the parties, nor to revise the decree, nor to exercise any power or jurisdiction over any part of the proceedings therein. If it erroneously decided the question whether that decree ought to preclude the wife from obtaining any relief in the suit she was then prosecuting against the husband, and thus failed to give as much effect to the decree as it was legally entitled to, that did not render its decree invalid. It still remains in full force, and being a

¹¹⁴ *Smith v. Smith*, 17 Ill., 483.

decree of a court of competent jurisdiction in a sister state, pronounced in a suit in which the court had jurisdiction over the subject matter, and in which the defendant appeared, it is entitled to the same effect it would be had it been rendered in a court of competent jurisdiction in our own state. Whether a decree is erroneous, is not a legitimate inquiry in a suit brought for its enforcement. This matter can be investigated and determined only by a court having a revisory jurisdiction. A court in this state has no more power over the judgments of another state than the courts of that state have over the judgments of this state, and consequently cannot institute an inquiry for the purpose of determining whether or not such a decree is erroneous. If it be not void for the want of jurisdiction in the court, either over the subject-matter or the person of the defendant, or because it has been fraudulently procured, or that the same matters have been previously litigated between the same parties in a court of this state, then, it must be respected and treated as a valid decree.”¹¹⁵

SEC. 538. Although a want of jurisdiction vitiates any judgment, domestic or foreign, yet we must ever bear in mind that the ordinary presumptions prevail in the latter, as well as the former instance, as to superior courts of general jurisdiction, and as to the regularity of proceedings in regard to all courts manifestly having jurisdiction. The difference is, that as to the regularity, the presumption is conclusive; as to the jurisdiction, it is rebuttable. It is taken that there was the requisite jurisdiction in the original suit, unless the contrary is distinctly shown. If, however, it does appear that the defendant had no opportunity of making his defense, from want of notice, or otherwise, the presumption is overcome, and the jurisdiction is regarded as usurped, until it is shown that the proceeding was in accordance with the provisions of the local law, as for example, in the case of a “substitutional service,” under Canada law,¹¹⁶ which provides that where there have been reasonable efforts made to effect personal service, and the writ has come to the knowledge of the defendant, or he willfully

¹¹⁵ *Rogers v. Rogers*, 15 B. Mon., 382.

¹¹⁶ *Kerr v. Condy*, 9 Bush., 376.

evades service, and does not appear, the court may, by order, grant leave to the plaintiff to proceed as if personal service had been effected, subject, however, to such conditions, as in the discretion of the court, may seem fit.

In consequence of the usual presumption, one seeking to impeach a judgment on account of the want of personal jurisdiction, must negative every possible mode of service, and it is the general rule that the return of an officer in the primary cause is unimpeachable, although it is so closely and intimately connected with the fact of personal jurisdiction. In regard to a case of divorce, the Surrogate Court of New York, holds this language: "The return, if conclusive, disposes of the question of jurisdiction of the person. The conflict of evidence in this case demonstrates, in an eminent degree, the wisdom and safety of the rule which holds the return to be unimpeachable. It must be borne in mind, that this petitioner had become a denizen of New Jersey, and owed allegiance to its authority, that she was a citizen of that state, that the process was issued by its high court of chancery, that the officer making the return was the sheriff of the county of her residence, and acted under oath, that the return was made to a court not only competent but willing to do full justice, and able to correct any mistakes or errors of its sheriff, in due time, and before judgment, and that the return gave full jurisdiction of the person of the defendant on which the court could proceed according to its 'usage.' If, in every case, this return could be collaterally impeached by a citizen, or traversed in the case, the wheels of justice would be stopped, and all confidence and safety in judicial proceedings would be at an end. No rule can, with convenience and safety, be adopted, but to hold the return of the officer on process to be conclusive on the parties, leaving the party injured by a false return to his remedy by action against the officer."¹¹⁷ But, in Massachusetts, the contrary has been held, and the court gives as the reason therefor, that "no more force and effect can be given to the certificate of a person purporting to be a deputy sheriff in another state

¹¹⁷ *Black v. Black*, 4 Bradf., 198.

in giving the court jurisdiction over an absent party than to similar acts of attorneys. To say nothing of the danger of false personation, and other devices by which an officer of another state might be induced to believe that a stranger was the defendant against whom he had process, it seems to be giving quite sufficient effect to such a return to make it *prima facie* evidence, leaving the defendant the right to rebut it by evidence.¹¹⁸ Also, in Texas, the return can be impeached on an allegation of fraud in obtaining the judgment, where the fraud cannot be established without proving the return of the sheriff to be false.¹¹⁹ I am not sure that in all the states this might not be allowed as an exception to the general rule. In Iowa, it is held that although a process returned in due form is not impeachable, yet a judgment entry that the defendant was "served," or "duly served," may be contradicted as a mere recital.¹²⁰ In Illinois, it is held that where the record is silent as to service of process, the judgment itself is *prima facie* evidence of jurisdiction¹²¹—which is in accordance with the general rule, because it is not to be presumed that the court of a sister state exercises a jurisdiction beyond its competency, such a presumption being forbidden by "comity, good sense and law;" and so in the absence of any impeachment it will not be held that such judgments have been rendered without notice, and whatever appears in the record of such judgment to have been regarded by the court as a sufficient waiver of notice, under the law of the state where rendered, will be held in the same way where the later suit is instituted.¹²²

Where a copy left at the residence is a sufficient notice where the judgment is rendered, it will be so held elsewhere.¹²³ But a statute authorizing a judgment without appearance, or actual or constructive notice—as, in Pennsylvania, a statute authorizing a prothonotary to enter up judgment without appearance,

¹¹⁸ *Carlton v. Bickford*, 13 Gray, 596.

¹¹⁹ *Norwood v. Cobb*, 15 Texas, 504.

¹²⁰ *Pollard v. Baldwin*, 22 Iowa, 333.

¹²¹ *Dunbar v. Hallowell*, 34 Ill., 169

¹²² *Nunn v. Sturges*, 22 Ark., 389.

¹²³ *Biesenthal v. Williams*, 1 Duv., 329.

upon the mere filing of a warrant of attorney verified by affidavit—can only have force on citizens of the state, and a judgment thus entered will be regarded as a nullity outside of the state where rendered. Yet if there is a statute allowing an inferior court to enter judgment on a transcript from another judgment, without service of the *scire facias*, and on one return of *nihil* instead of two as required by the common law, the statute may be set out and such secondary judgment it seems may then be enforced in another state.¹²⁴

SEC. 539. It has been held that where a judgment is rendered in another state against a non-resident, with publication of notice, and afterwards the defendant appears by attorney, files an affidavit, and obtains leave to answer on payment of costs, and fails to answer, the former judgment may be re-instituted, and will then be conclusive in the state where the defendant resides,¹²⁵ and *per consequence* everywhere else.

SEC. 540. Where, by statute, a writ of *scire facias* in a garnishment or trustee proceeding, issued after judgment rendered by default in the original suit, is regarded only as a continuation of the original suit; and, where the statute also provides that service of such writ may be made by leaving a copy at the last and usual place of abode of the garnishee, such service will bind a trustee personally, even though, after default and before such service, he has removed from the state, if he leave no property behind him, and the judgment rendered thereon may be enforced in the state to which he has removed, after due demand being made for the payment of the judgment according to the law of the state where the judgment was rendered.¹²⁶

SEC. 541. In no case does a mere knowledge of the pendency of a suit dispense with the imperative necessity of actual or constructive service, or else appearance.¹²⁷

SEC. 542. Where a judgment goes adversely to a plaintiff in another state for costs, or otherwise, it has been held, in Massachusetts, that, in an action on such judgment in another

¹²⁴ *Cone v. Cotton*, 2 Blackf., 82.

¹²⁶ *Burns v. Belknap*, 22 Vt., 419.

¹²⁵ *Harbin v. Chiles*, 20 Mo., 314.

¹²⁷ *Woodward v. Tremere*, 6 Pick., 354.

state, he may show that he gave no authority to institute the suit, and had no knowledge of its pendency.¹²⁸ And, moreover, a judgment in that state against two defendants, one non-resident—the latter not served with process nor his property attached and not authorizing any appearance—he may have the judgment reversed as to him by writ of error, although the record states at the term at which the action was entered that "the defendants came by their attorney."¹²⁹

In New York, the recital of a record that a defendant appeared by attorney is *prima facie* proof of the fact, but may be contradicted.¹³⁰ And so, it has been held that the notorious Indiana divorces, where neither of the parties in fact resided in that state at the time, and there had been no service, and no appearance, were invalid, although the record of the Indiana court recites the residence of the plaintiff for a year in the state in good faith, and shows an appearance of the defendant by one purporting to be an attorney at law in that state, and the rule is stated to be: "The judgment of a court of a sister state has no binding effect in this state, unless the court had jurisdiction of the subject-matter, and of the persons of the parties. Want of jurisdiction is a matter which may always be interposed against a judgment, when sought to be enforced, or when any benefit is claimed for it, the want of jurisdiction either of the subject-matter or of the person of either party renders a judgment a mere nullity. It was said in *Noyes v. Butler*, 6 Barb., 613, 'the constitution of the United States which declares that full faith and credit shall be given in each state to the judicial proceedings of every other state, and the acts of Congress which declare that the judgments of the state courts shall have the same faith and credit in other states as they have in the state where they are rendered, do not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered, nor an inquiry into the rights of the state to exercise authority over the parties or the subject-matter, nor an inquiry whether

¹²⁸ *Watson v. Bank*, 4 Met., 343. ¹³⁰ *Shumway v. Stillman*, 6 Wend., 447.

¹²⁹ *Bodurtha v. Goodrich*, 3 Gray, 508.

judgment is founded on, or impeachable for fraud; and that such a judgment may be inquired into although the record states facts giving the court jurisdiction. Such record is never conclusive as to recitals or statements of jurisdiction."¹³¹ And, accordingly, even the authority of an attorney who actually did appear for the party is open to impeachment in the state where a judgment is sought to be enforced by action,¹³² although, of course, unless the authority is impeached, it will be held to exist, and to justify the proceedings.¹³³ In Illinois, it is held that where the record recites an appearance by attorney, the *fact* cannot be contradicted, but the *authority* not being a matter of record may be impeached.¹³⁴ But it is directly the other way in Missouri, where such a recital concludes the fact of authority, as well as of the appearance.¹³⁵

SEC. 543. As to the general subject of the conclusiveness of record recitals, just glanced at above, there exists a difference in different courts, as we have seen. In Indiana, for example, a recital of personal service cannot be contradicted.¹³⁶ But the general rule is certainly that recitals pertaining to jurisdiction can be disproved. The Supreme Court of the United States quotes with approval¹³⁷ the doctrine of the New York and other courts, as set forth in the following language: "The courts of Connecticut, Pennsylvania, New Hampshire, New Jersey and Kentucky, have also decided that the jurisdiction of a court rendering judgment may be inquired into when a suit is brought in the courts of another state on that judgment. This doctrine does not depend merely on the authority of adjudged cases; it has a better foundation; it rests upon a principle of natural justice. No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence

¹³¹ *Kerr v. Kerr*, 41 N. Y., 275.

¹³² *Baltzell v. Nosler*, 1 Iowa, 588.

¹³³ *Harshey v. Blackmar*, 20 Iowa, 161.

¹³⁴ *Lawrence v. Jarvis*, 32 Ill., 305.

¹³⁵ *Warren v. Lusk*, 16 Mo., 102.

¹³⁶ *Westcott v. Brown*, 13 Ind., 83.

¹³⁷ *Harris v. Hardeman*, 14 How., 340.

without the privilege of showing, if he can, the claim against him to be unfounded. If a party has a right to defend himself in an action upon a judgment of a sister state, by showing a want of jurisdiction in the court that rendered it, he must be permitted to plead such facts to make out the defense. *

* * * * But it is strenuously contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not, in truth, a record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record, but if he cannot show even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiffs, in effect, declare to the defendant, the paper declared on is a record because it says you appeared, and you appeared because the paper is a record; this is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue (and the whole current of state court authority shows it to be a proper issue), is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped by any allegation in that record from proving any fact that goes to establish the truth of a plea alleging a want of jurisdiction.

So long as the question of jurisdiction is in issue, the judgment of a court of another state is, in its effect, like a foreign judgment; it is *prima facie* evidence, but for all the purposes of sustaining that issue, it is examinable to the same extent as a judgment rendered by a foreign court. If the jurisdiction of the court is not impeached, it has the character of a record, and for all purposes should receive full faith and credit.”¹³⁸

Of course, impeaching evidence must be of a conclusive character, or the record will prevail. Thus, where a record contained the copy of a summons and a return of service on it, it was held not sufficient for the defendant to produce another duly certified record, which contained no summons or recital of service.¹³⁹ But *vice versa* where a transcript is filed consisting of a declaration in assumpsit and the judgment rendered thereon, this does not preclude the plaintiff from offering in evidence a fuller transcript containing in addition a copy of the original writ and service thereon.¹⁴⁰

It is only a jurisdictional fact that can be controverted, and not mere subsequent proceedings, although requisite; as the service of a rule to plead, etc. But some authorities go the whole length of making the recitals of the record conclusive even on jurisdictional facts, and the Michigan Court lays down the following rules as sustained by authority: “1. That, in an action in one state upon the judgment of a court of general jurisdiction of another state, no plea or proof can be received in contradiction of any material fact appearing by the record, unless such plea or proof would be received in an action upon it in the court in which it was rendered. 2. That if the record shows a want of jurisdiction, the judgment is a nullity. 3. That if the record does not show either that the court had, or that it had not, jurisdiction, the jurisdiction will be presumed, but in such case facts showing a want of jurisdiction may be alleged by plea, and if established, a recovery may

¹³⁸ *Starbuck v. Murray*, 5 Wend., 156–158, *passim*; *D'Arcy v. Ketchum*, 11 How., 174.

¹³⁹ *Barringer v. King*, 5 Gray, 9.

¹⁴⁰ *Lattourett v. Cook*, 1 Iowa, 1.

thus be defeated; and 4. That when the record shows that the process was not personally served, and that the defendant did not appear in person in the suit, but that an attorney of the court appeared for him, and made defense, the authority of such attorney so to appear will be presumed.”¹⁴¹

The doctrine, in Vermont, is, that the records can, in no case, be disputed, even in matters of jurisdiction,¹⁴² unless they could be disputed in the state where the judgment was rendered, which, I judge, could not generally be done even where jurisdiction is assailed. In Connecticut, the contrary is held, and the court, per HOSMER, Ch. J., certainly reasons very conclusively on what I think to be the general rule in this matter sustained by the weight of authority. The Chief Justice says: “Admitting, as I do most fully, that a judgment rendered in a sister state by a court which has jurisdiction of the subject-matter and parties is conclusive and unimpeachable, I am equally clear that where the defendant neither appeared, nor had legal notice to appear, a judgment against him is invalid, and ought not to be enforced. So far as my knowledge extends, no decision has been had [1822] giving validity to a judgment under the circumstances last mentioned. The cases of *Mills v. Duryee*, 7 Cranch., 481, and *Hampton v. McConnell*, 3 Wheat., 234, have no relevancy to the point under discussion. In both these cases, the defendants were within the jurisdiction of the courts whose judgments were questioned, and having had notice to appear, they in fact appeared and made defense. The courts did not, nor could they, express an opinion on the present point of inquiry, unless they traveled out of the record. In *Hitchcock v. Aicken*, 1 Caines, 460, the judges, LIVINGSTONE and THOMPSON, after having admitted the conclusiveness of judgments when duly rendered, expressed decisive opinions on the point now under discussion. Speaking of determinations without personal summons, or arrest, it was said by LIVINGSTON, J., ‘perhaps we possess the power, and I think we do, in extraordinary cases, and where it is manifest the proceedings

¹⁴¹ *Wilcox v. Cassick*, 2 Mich., 177.

¹⁴² *Lapham v. Briggs*, 27 Vt., 31.

have been *ex parte*, of considering them as exceptions to the general law, and as not contemplated by the constitution. Now, no violence is done to my understanding of this article [of the constitution] in saying that it does not embrace a judgment which has been rendered against a party to whom no opportunity was offered of contesting his adversary's demand, and who, instead of being defended by himself, or by counsel of his own choice, had no other representative than an old blanket or a log of wood. A sentence thus determined, in defiance of the maxim *audi alteram partem*, deserves not the name of a judgment.' 'I think,' said THOMPSON, J., 'the rule laid down by the court in the case of *Kibbe v. Kibbe*, above cited, is founded in justice and good sense, that the judgments of courts in sister states ought to receive full credence where both parties were within the jurisdiction of the court at the time of commencing the suit, and were duly served with process, and had, or might have had, a fair trial of the cause.' In *Kilbourne v. Woodworth*, 5 Johns., 41, which was an action of debt on a judgment recovered against a person in the state of Massachusetts domiciliated in the state of New York, it was adjudged that the suit could not be sustained. 'To bind a person personally by a judgment,' said one of the judges, 'when he was never personally summoned, nor had notice of the proceeding, would be contrary to the first principles of justice.' This determination has been followed by similar decisions, in the same court, in *Robinson v. Ward*, 8 Johns., 86; *Fenton v. Garlick*, 8 Johns., 194; *Pawling v. Wilson*, 13 Johns., 192; and *Berden v. Fitch*, 15 Johns., 121. In the State of Massachusetts, the subject underwent a very able discussion by the late learned CH. J. PARSONS, in *Bissell v. Briggs*, 9 Mass, 462, 'neither our own statute,' said he, 'nor the federal constitution, nor the act of Congress, had any intention of enlarging, restraining, or in any manner, operating upon, the jurisdiction of the legislatures, or of the courts of any of the United States. The jurisdiction remained as it was before, and the public acts, records, and judicial proceedings contemplated, and to which full faith and credit are to be given, are

such as were within the jurisdiction of the state whence they shall be taken. Whenever, therefore, a record of a judgment of any court of any state is produced as conclusive evidence, the jurisdiction of the court rendering it is open to inquiry, and if it should appear that the court had no jurisdiction in the case, no faith or credit whatever will be given to the judgment. In order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the federal constitution, the court must have had jurisdiction not only of the cause but ~~of~~ the parties.' In this opinion, the other judges concurred, and the decision has been followed by a similar determination, in *Jacobs v. Hull*, 12 Mass., 25. In the State of Connecticut, judgment to the same effect was given by the superior court, in *Kibbe v. Kibbe*, Kirby 124, succeeded by the case of *Smith v. Rhoades*, 1 Day, 186, in the adjudication of which the same point, although not expressly adjudged, is clearly implied. These uniform and concurring opinions of the most respectable and learned judges are entitled to the highest deference. The principle involved in them is fully sanctioned by the determinations in Westminister Hall. In *Fisher v. Lane*, 3 Wils., 197, it was said by Lord Ch. J. DE GREY, when speaking of the supposed default of a Mrs. Fisher that 'she made no default, for it appears she never was summoned, or had notice, which is contrary to the first principles of justice.' And in *Buchanan v. Rucker*, 9 East., 192, the court adjudged that the law will not raise a promise upon a judgment obtained by default against a person in one of the colonies who was summoned only by nailing a copy of the declaration on the court house door.

"Independent of decisions, on the foundation of principle only, I can entertain no doubt relative to the construction of the constitution of the United States. In expounding this instrument, adherence must not be had to the letter, in opposition to the reason and spirit of the enactment, and hence to effectuate the object intended, it is even proper to deviate from the usual sense of the words. Where they admit of different intendments, that must be selected which is most consonant to

the object in view. Every interpretation which leads to an absurdity ought to be avoided, and that is properly denominated absurd which is morally impossible, or so contrary to reason that it cannot be attributed to a man in his right senses. ‘When rights are infringed,’ said C. J. MARSHALL, ‘while fundamental principles are overthrown, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.’ The words, ‘full faith and credit shall be given in each state to the records and judicial proceedings of every other state,’ do not comprise that unquestionably clear and definite expression of intention which precludes construction. The most plenary faith and credit undoubtedly must be given; but the sole difficulty consists in precisely ascertaining the subject of this confidence. What is intended by the records and judicial proceedings of any other state? These words are sufficiently comprehensive to embrace every judgment *in fact*; and on the other hand, they may rationally be satisfied by a limitation to such judgments only as are duly rendered by a court of competent jurisdiction against those who appeared to defend or were legally notified to appear. To adopt the former construction were unreasonable and absurd. A more preposterous proposition cannot be advanced, one more contrary to reason and justice, more injurious to the absolute rights of man, or to fundamental principle, than that a person shall be invincibly bound by a judgment obtained against him without notice. *Audi alteram partem* is a maxim equally just and indisputable; and when from this acknowledged principle there is a departure, if estate is thereby subjected to an *ex parte* judgment, the right of property is violated, and if the body is plunged into a prison, the more important right of personal liberty is destroyed. It cannot reasonably be presumed that it was intended by the constitution of the United States to effectuate such glaring injustice, nor is there any reason to believe it derived from the phraseology of that valuable instrument. To the expression, ‘the records and judicial proceedings,’ annex

the just and reasonable limitation before mentioned, that they are such, and such only, as are duly rendered by a court of competent jurisdiction against those who appeared to defend, or who were legally notified to appear, and while the absurdity of a more comprehensive provision is avoided, there is scarcely a departure from the popular meaning of the words. The qualification alluded to is a necessary *subintelligitur* to reach the just meaning of the constitution, and avoid a construction too unreasonable and oppressive for a moment to be admitted.

"No sufficient objection arises from the expression in the record that the defendant *appeared by his attorney*. The attention of the court is seldom, if ever, called to the inquiry, unless specially directed to it, whether a person claiming to be the attorney of the party is really such, and the record by the management of the plaintiff needs never to be destitute of this affirmation. In *Robson v. Eaton*, 1 T. R. 62, Lord Mansfield permitted the defendant to show that the person declared in the record in a former case to be his attorney, was not his attorney. 'The record of the common pleas,' said he, 'amounts to no more than this, that the attorney prosecuted the suit in the plaintiff's name.'"¹⁴³

Without threading our way further through the tedious labyrinths of adjudged cases upon this topic, we may briefly state as the prevailing doctrine of the authorities that records from other states may be disputed as to any jurisdictional fact therein recited, that is to say, the question of jurisdiction is entirely open in all cases.

SEC. 544. It is, of course, sufficient that the defendant in the primary action had opportunity to defend therein. A judgment entered by default is as conclusive as one which results from a regular trial of the issues.¹⁴⁴ But a judgment rendered without any statement of the cause of action, in some form recognized by law, can have no force beyond the jurisdiction of the court which rendered it; so that a transcript

¹⁴³ *Aldrich v. Kinney*, 4 Conn., 383. ¹⁴⁴ *Norwood v. Cobb*, 20 Texas, 588.

must show some form of proceeding upon definite issues,¹⁴⁶ although no particular form of action is requisite, so that where technicalities in forms are abolished in the state where the judgment is rendered, the courts of other states will treat the judgment as it is regarded at home.¹⁴⁷

SEC. 545. As before observed, a defendant cannot be allowed to show that there was not a sufficient cause of action in the primary suit, nor that the cause of action arose in the state where the judgment is sued on, and is by its laws such a one as could not be recovered on.¹⁴⁸ And it has been held in Georgia, that although the courts of that state will not enforce the provisions of a will made in another state which are directly contrary to the declared policy of Georgia, yet the judgment of a competent tribunal as to such a will in the state where executed will be respected by the Georgia courts.¹⁴⁹ And so with judgments rendered as to mere police regulations incapable of enforcement beyond the state; the judgments will, nevertheless, be given faith and credit elsewhere.¹⁵⁰ Even a judgment which would not be a judgment at all in the state where an action is brought upon it will be regarded as one by virtue of its being so considered where rendered¹⁵⁰—which circumstance, however, must be shown, the presumption being against such apparently invalid judgment.

SEC. 546. A personal appearance entered by mistake, where there was no service, will conclusively sustain the judgment. A singular case, however, arose in Tennessee, on this wise: A suit in ejectment was commenced, and also a separate suit for use and occupation. The defendant employed a counsel in the former, but not in the latter. Afterward, proceedings in contempt were instituted against him, which he supposed grew out of the ejectment suit, but which actually grew out of the use and occupation suit. In this contempt matter he

¹⁴⁵ *Young v. Rosenbaum*, 39 Cal., 653.

¹⁴⁶ *Griffin v. Eaton*, 27 Ill., 379.

¹⁴⁷ *Phillips v. Godfrey*, 7 Bosw., 150.

¹⁴⁸ *Whitley v. State*, 38 Ga., 75.

¹⁴⁹ *State of Indiana v. Helmer*, 21 Iowa, 370.

¹⁵⁰ *Claumer v. Cooper*, 24 Iowa, 185.

also employed counsel. Subsequently, an action was brought in Massachusetts on the judgment for use and occupation, and it was held in the lower court that although he had no service therein, yet his appearance in the contempt proceedings, under the supposition that they grew out of that suit, was virtually an appearance, and therefore a waiver of service. But the appellate court regarded this ruling erroneous, and said: "The process for contempt, though it arose out of the suit for use and occupation, was an entirely distinct proceeding, in behalf and in the name of the state, and not of the plaintiff. An appearance, whether voluntary or compulsory, to answer to that process, would not prove an appearance in the civil suit. It is immaterial whether the defendant acted under the mistaken belief that the process of contempt grew out of the ejectment suit, or not. In either case, the appearance in the contempt proceedings would not be equivalent to or prove an appearance in the suit for use and occupation,"¹⁵¹ which is to say, that appearance in a consequential action is not appearance in the primary action which accidentally gave rise to it.

SEC. 547. As to legal presumptions, it has been held that in the absence of knowledge as to what the law of a sister state is on matters of common law, courts will presume it to be the same as that of the state where they are convened¹⁵² as to superior courts of general jurisdiction, while, as to inferior courts the statutes conferring jurisdiction must be set out in the transcript.¹⁵³ There is no presumption indulged that a justice of the peace can render judgment in a civil action, because, at common law, he was only a conservator of the peace, and had no civil jurisdiction; this, therefore, being wholly statutory.¹⁵⁴ Even as to a superior court, no presumption will be extended to the support of acts contrary to the principles of the common law; as, for example, the judgment of a court of another state whereby property is taken without making the owner a party to the action, will not be upheld by a presumption that the court exercised its powers discreetly.

¹⁵¹ *McDermott v. Clary*, 107 Mass., 504. ¹⁵³ *Grant v. Bledsoe*, 20 Tex., 456.

¹⁵² *Warren v. Lusk*, 16 Mo., 102.

¹⁵⁴ *Willey v. Strickland*, 8 Ind., 453.

Even if the law authorizing such arbitrary proceedings were proved, yet these, being directly opposed to common right, cannot receive enforcement elsewhere.¹⁵⁵ A presumption that the laws of another state are the same as domestic laws may, of course, be rebutted by showing what those laws really are.¹⁵⁶ And not unfrequently the presumption merely is that the common law prevails in the state where the judgment was rendered.

SEC. 548. A judgment against a firm cannot be enforced individually against one of the partners not served, nor appearing. The entry by an attorney of his appearance for the defendants will be construed as an appearance for them as partners only, so as to bind the firm, and not as an appearance personally, to bind them individually.¹⁵⁷

SEC. 549. A foreign judgment may sometimes be impeached for fraud, but this must be a fraud in obtaining the judgment itself, and not merely existent in the basis of the primary action. Its character may be various, however, and it would seem that anything almost may be regarded as a fraud, in the sense intimated, which, by the co-operation of the plaintiff prevents a defendant from availing himself of existing defenses. Thus, in Tennessee, it has been carried out to the apparently extreme length that political excitement may be assigned as such a countervailing fraud, if availed of by the active exertions of the opposite party. On a Kentucky judgment, sued on in Tennessee, the plea was in effect that in consequence of a great political prejudice prevailing at the time he was served, the defendant could not defend the suit without endangering his life, and that the plaintiff, knowing this, had taken advantage of the circumstances, and of the defendant's temporary sojourn in the state of Kentucky to serve process on him; and that he "fraudulently combined with the citizens of Kentucky, by force and threats, to keep him from making his defense, and so took judgment against him by default, well knowing that defendant did not owe him

¹⁵⁵ *Denison v. Hyde*, 6 Conn., 509.

¹⁵⁷ *Phelps v. Brewer*, 9 Cush., 390.

¹⁵⁶ *Rape v. Hesten*, 9 Wis., 329.

a cent." In Tennessee, the lower court sustained a demurrer to this plea, but, on error, this was held to be a false ruling—the plea being sufficient in law to constitute a good defense on the ground of fraud, and a judgment of this kind not being, any more than a domestic judgment, "of such absolute perfection, or inviolability, as to preclude an inquiry in the court of the state in which suit is brought upon it, as to whether it is founded in, and impeachable for, a manifest fraud. If it was clearly shown in the proper court of any state where a judgment is rendered that it was obtained by fraud, it would be set aside. It can have, where an action is brought upon it, no more force or effect than in the state where the judgment was rendered."¹⁵⁸

SEC. 550. And courts are not disposed to favor a plaintiff's going into another jurisdiction for the purpose of obtaining a judgment which could not be obtained in the domestic tribunals. This is considered *prima facie* fraudulent, and the judgment will be more fully open to impeachment, and will not be regarded as conclusive even on the question of citizenship. Perhaps this trick is more frequently practiced in cases of divorce; which, to our shame be it spoken, is treated in some of our states in the most scandalous manner, although it ranks among the most important subjects which can possibly engage judicial attention. The consequence inevitably is a loosening of social bonds, and the introduction of boundless licentiousness as developed in "free love" principles and practices. And this must, in the nature of things, grow worse and worse, until our legislatures and our courts can be induced to pay a little heed to the solemn divine mandate, delivered by the Redeemer himself, in startling tones: "WHAT GOD HATH JOINED TOGETHER, LET NO MAN PUT ASUNDER." In Massachusetts, it has been held, that it is no defense to an action for divorce by the wife that the husband had previously obtained a divorce in a state of which he was not a citizen, but whither he had gone for the purpose of applying for such decree, while she remained in

¹⁵⁸ *Coffee v. Neeley*, 2 Heisk, 312.

Massachusetts; and, there gained his object fraudulently, and that the decree granting his divorce is not conclusive as to his citizenship; and upon this question of citizenship, it is competent to prove by records, that before leaving the state, he twice instituted suits for divorce, in which he failed, and that he was compelled to pay, and did pay, a judgment rendered against him for her board for a part of the time during which, in his bill for divorce, he alleged she had deserted him.¹⁵⁹

SEC. 551. The general rule, it will be remembered, is, that usually only such pleas as are available in the state where the judgment is rendered in an action upon it, are available elsewhere. But fraud in the very act of obtaining a judgment is certainly a valid plea in the state where rendered in an action to enforce it, and, therefore, is so in other states. Yet fraud in the *basis* of a suit is not available; and the Supreme Court of the United States seems to go so far as to hold that fraud is never available to parties, but only to third persons.¹⁶⁰

An example of fraud in the cause of action disallowed occurred in 1823 in the State of Massachusetts, thus: The defendants caused the plaintiff to insure a vessel for them, and after loss, sued on the policy, and recovered judgment, which was satisfied by payment on execution. Plaintiff subsequently sued them to recover back the money, on the ground that they knew of the loss at the time of the insurance, but concealed it from him. Held, that the action could not be maintained.¹⁶¹ In that state, however, it has been held, that even fraud in obtaining the judgment is not available.¹⁶² But this was held on the authority of the case just above cited, which was not in point, since it related only to fraud in regard to the *cause of action*, and moreover is inconsistent with the Massachusetts doctrine as announced in the divorce case cited in the last section, *supra*. Yet, in a later case, it is declared expressly, that

¹⁵⁹ *Shannon v. Shannon*, 4 Allen, 134.

¹⁶⁰ *Christmas v. Russell*, 5 Wall., 304. But see *Webster v. Reid*, 11 How., 437.

¹⁶¹ *Homer v. Fisk*, 1 Pick., 435.

¹⁶² *McRae v. Mattoon*, 18 Pick., 57.

fraud is not available even in the rendition of a judgment.¹⁶³ And it is so held in Connecticut.¹⁶⁴ In New York, it has been held that a judgment confessed for the purpose of defrauding creditors can be avoided by the creditors,¹⁶⁵ on which there is no dispute, however. But furthermore, it has been held that a judgment or decree obtained on false or fraudulent suggestions, is void.¹⁶⁶ And it is laid down as a general principle that whenever an act is done *in fraudem legis*, it cannot be the foundation of a suit, in the courts of a country whose laws are attempted to be infringed;¹⁶⁷ and the necessary deduction is, that, if it cannot be enforced there, it cannot elsewhere, under our constitution and the act of Congress. Also, the court declares broadly, on the authority of Fenner's case, 3 Coke, 77, "that all acts and deeds, judicial, as well as extra judicial, if mixed with fraud, are void;" and also that whenever a fraudulent party afterwards seeks to avail himself of the benefits of his fraudulent acts, the fraud can be alleged; for, "otherwise, he would be permitted to derive a benefit from his own misconduct; a position altogether inadmissible."¹⁶⁸

In Ohio, fraud is not available as a defense to an action on a judgment of a sister state.¹⁶⁹ But in Indiana it is available.¹⁷⁰ In Iowa it is not.¹⁷¹

It seems to me very decidedly that those authorities which hold that an advantage obtained by fraud may be enforced in another state, thereby controvert the most fundamental principles both of equity and of law. Thus it is an equitable maxim that no man can be permitted to take advantage of his own wrong, yet the doctrine herein is that a man must be permitted to have advantage of his own wrong in procuring a

¹⁶³ *R. R. v. Sparhawk*, 1 Allen, 448.

¹⁶⁴ *Sanford v. Sanford*, 28 Conn., 28.

¹⁶⁵ *Kirby v. Fitzgerald*, 31 N. Y., 424.

¹⁶⁶ *Borden v. Fitch*, 15 Johns., 145.

¹⁶⁷ *Jackson v. Jackson*, 1 Johns., 432.

¹⁶⁸ *Borden v. Fitch*, *supra*.

¹⁶⁹ *Andersen v. Andersen*, 8 Ohio, 108.

¹⁷⁰ *Holt v. Alloway*, 1 Blackford, 108.

¹⁷¹ *Mason v. Messenger*, 17 Iowa, 262.

fraudulent judgment. Again, the courts which hold this doctrine, as well as all others, admit that fraud in the cause of action is a valid defense at law, against every kind of contract and obligation. But, here, it is held, that a palpable fraud existent *in the judgment* of a sister state, cannot be set up against the judgment when it is used as a cause or basis of action in the domestic tribunals. Again, the doctrine can only be maintained by holding to the absolute infallibility of all judgments, in the broadest sense, which must, of necessity exclude all inquiry into the actions of courts even in reference to the matter of jurisdiction. It is the policy of our courts to enforce fair dealing, and to give no sanction whatever to schemes of fraud, and while there is a solid reason for not *going behind* a judgment to get at an alleged fraud, there seems to be none whatever for refusing to ferret it out of a judgment itself. I would rather believe that an excess of jurisdiction, in any way, is not to be inquired after, than that an ingenious unprincipled man may, and must, be allowed to practice his arts on helpless unsuspecting victims, and entangle them in the net of a fraudulent judgment, and then to call upon the courts of other states to help him land them for the purpose of plundering them, and that, in such case, the courts can do nothing but meekly obey the imperious behests, and calmly submit to assist in subverting the principles of justice and of public policy! Vice has too many facilities, now, to secure its triumphs, without our throwing up as a bulwark and fortification before it an impregnable conclusiveness of fraudulent judgments under the plea of comity and judicial sanctity! Surely, surely, there is no such principle of jurisprudence as would require this shocking imbecility of right and equity!

SEC. 552. The true rule, certainly, is, that "a judgment fairly and duly obtained in one state is conclusive between the parties, when sued on in another state. The defendant may show in bar of an action on the record of a judgment of another state, that the judgment was fraudulently obtained, or that the court pronouncing it had neither jurisdiction of his

person nor of the subject matter of the action. If he succeed in establishing any one of these defenses, the judgment is entitled to no credit, and the plaintiff is driven to his suit on the original cause of action.”¹⁷²

SEC. 553. It is held, in Pennsylvania, that an action of debt will lie on a foreign judgment, notwithstanding an appeal from it is pending in the state where it was rendered.¹⁷³ And it is so in Massachusetts, provided an appeal does not stay proceedings on the judgment in the other state.¹⁷⁴ In Alabama, it is held that a decree of an appellate court must be regarded, in the absence of proof to the contrary, as the only decree in the cause wherein it is given.¹⁷⁵

SEC. 554. A transcript should show clearly that there has been a judicial determination, though the form is not essential.¹⁷⁶ When this is the case the “record is absolute verity, to contradict which there can be no averment or evidence. The court having power to make the decree, it can be impeached only by fraud in the party who obtains it.”¹⁷⁷ A record does not need to set forth all the proceedings in detail.¹⁷⁸ But this appears to be requisite in Louisiana.¹⁷⁹

¹⁷² *Welch v. Sykes*, 3 Gilm. (Ill.), 199.

¹⁷³ *Insurance Co. v. DeWolf*, 33 Pa. St., 45.

¹⁷⁴ *Faber v. Hovey*, 117 Mass., 107.

¹⁷⁵ *Hassell v. Hamilton*, 33 Ala., 280.

¹⁷⁶ *Taylor v. Runyan*, 3 Iowa, 480.

¹⁷⁷ *Grignon's Lessee v. Astor*, 2 How., 340.

¹⁷⁸ *Knapp v. Abell*, 10 Allen, 488.

¹⁷⁹ *Hockaday v. Skeggs*, 18 La. An., 681.

CHAPTER XXXVIII.

JUDGMENTS IN REM.

Section 555. General Rule.

- 556. Replevin not Proceeding in rem—nor Attachment.
- 557. General Definition.
- 558. Necessity of Notice.
- 559. Proceeding according to Local Law.
- 560. Condemnation of Vessels.
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- 562. Situation of the Res.
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- 567. Judicial Notice.
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- 570. Effect of unjust Edicts.
- 571. Admiralty Titles.
- 572. Breach of Blockade.
- 573. Insurance Risks.
- 574. Vessel and Cargo distinguishable.
- 575. Vessel taken by Pirates and Sold.
- 576. Wills.
- 577. Marriages.
- 578. Strangers not bound by Attachment Proceedings.
- 579. Public Boundaries.
- 580. Pendency of Admiralty Proceeding.

HITHERTO our attention has been altogether directed to judgments *in personam*, and it is necessary to devote a little

consideration to the less common, but perhaps not less important class of litigation, entitled proceedings *in rem*.

SEC. 555. As to actions *in rem*, we may here state in general terms, that there can be no rightful action by the tribunals on the basis of jurisdiction acquired by the attachment of property, that can reach beyond the property itself,¹ and of course it cannot be enforced in another state.² Service is not essential to jurisdiction strictly *in rem*, although it is, in all cases, essential to jurisdiction *in personam*.³ Accordingly, where the action is based on land only, the judgment is not, in another state, even *prima facie* evidence of debt,⁴ although, as to the property, all matters of right and title are conclusive everywhere,⁵ unless fraudulently influenced, or decided by a court without jurisdiction.⁶ These principles apply to the property of corporations as well as to that of individuals.⁷

SEC. 556. A suit in replevin is not a suit *in rem*, because, although it is so in form, yet, as to the judgment, it acts *in personam*.⁸ And so, proceedings in attachment are not strictly *in rem*, but are rather proceedings against the interest of the defendant, and those claiming under him in the property attached.⁹ And yet such actions as proceed primarily with property partake of the nature of actions *in rem*, so that in general, there is but little need to distinguish between the two classes. The Vermont court, *per HALL, J.*, defines the matter thus: "A judgment *in rem* is an adjudication pronounced upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is in form, as well as substance, between the parties claiming the right, and that it is so *inter partes*, appears by the record itself. It is binding only upon the parties appearing to be such by the record, and those claiming by them. A judgment

¹ *Steel v. Smith*, 7 Watts & S., 449. ⁶ *Wellborn v. Carr*, 1 Tex., 463.

² *Price v. Hickock*, 39 Vt., 292. ⁷ *Hulbert v. Ins. Co.*, 4 How. Pr., 279.

³ *Jones v. Spencer*, 15 Wis., 583. ⁸ *Mahogany Logs*, 2 Sumn., 592.

⁴ *Arndt v. Arndt*, 15 Ohio, 33. ⁹ *Megee v. Beirne*, 39 Pa. St., 62.

⁵ *Barrow v. West*, 23 Pick., 272.

in rem is founded on a proceeding instituted not against the person as such, but against, or upon, the thing or subject-matter itself, whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be." And as to attachments, and such like, limited proceedings *in rem*, the court say, they "are not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit; no notice is sought to be given to any other persons; and the judgment being only as to the *status* of the property as between the parties of record, it is, as to all other persons, a mere nullity."¹⁰

SEC. 557. Chief Justice MARSHALL has given a very comprehensive definition of proceedings strictly *in rem*, thus: "What is the nature of a proceeding *in rem*, and in what does its specific difference from an ordinary action consist? Is every action in which a specific article is demanded a proceeding *in rem*? If it were, a writ of right which demands lands, of detinue which demands a personal chattel, would be a proceeding *in rem*, to which all the world would be parties, and by which the rights of all the world would be bound. But this, all know, is not the law. What, then, is the rule by which cases of this description are to be ascertained? I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself by the service of the process, and making proclamation, authorizes the court to decide upon it, without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties. The rule is one of convenience, and of necessity. In cases to which it applies it would often be impossible to ascertain the person whose property is proceeded against, and it is presumable that the person whose property is seized, is either himself attentive to it, or has placed it in the care of some person who

¹⁰ *Woodruff v. Taylor*, 20 Vt., 73, 76.

has the power, and whose duty it is to represent him, and assert his claim. Such claim may be asserted, but the jurisdiction of the court does not depend upon its assertion. The claimant is a party, whether he speaks or is silent, whether he asserts his claim or abandons it. Thus, in the case of *Scott v. Shearman*, and others, 2 W. Blackstone, 977, which was an action of trespass against the officer who had seized goods which were condemned in the court of exchequer, Judge BLACKSTONE says: ‘The sentence of condemnation is conclusive evidence in a case in which no notice was given to the owner in person, who was not a party to the suit, because the seizure itself is notice to the owner who is presumed to know whatever becomes of his own goods. He knew they were seized by a revenue officer. He knew they were carried to the king’s warehouse. He knew, or might have known, that, by the course of law, the validity of that seizure would come on to be examined in the court of exchequer, and could be examined nowhere else. He had notice by the two proclamations according to the course of that court. He had notice by the writ of appraisement, which must be publicly executed on the spot where the goods were detained. And having neglected this opportunity of putting in his claim and trying the point of forfeiture, it was his own *laches*, and he shall forever be concluded by it.’ But, in every case, where parties are necessary to give the court cognizance of the cause, the decree, the judgment, or the sentence binds those only (with some few exceptions standing on particular principles), who are parties or privies to it. If a party is necessary, it follows that the party should be one who has the real interest, and to secure this the interest of persons who are not parties cannot be affected. This is understood to be as true with respect to cases in the courts of admiralty, and of the exchequer, as in courts of common law and chancery. If a case be cognizable in either of those courts, in consequence of the seizure which vests the possession, and of a general proclamation of that fact, every person is a party to the proceeding, and his interest is bound by the sentence; but in a case in which the law requires

that parties should be brought before the court, the sentence binds those only who are parties.”¹¹ In a proceeding *in rem*, as in admiralty, the whole world are regarded as parties, and any person whomsoever, having an interest in the property, may interpose a claim, or prosecute an appeal from the sentence,¹² and all the world are, therefore, concluded in any collateral proceeding. And, of course, specific parties are not necessary: “where the *subject-matter* of the suit, the *Res*, is within the territorial dominion of the sovereign power, under the authority of which the court acts; it is within the jurisdiction of such court. The presence, or the domicil of the parties proceeded against has no importance in such case in determining the question of jurisdiction. They would, on the other hand, be all important if the proceeding were purely *in personam*. * * * Having jurisdiction of the subject-matter *in rem*, the local regulations and laws of the country in which the court proceeds, must determine what service of process, or what form of notice, shall suffice to give to the defenders an opportunity of being heard in their defense.”¹³

SEC. 558. But we must not suppose that because there needs no personal notice to any one,¹⁴ notice may be altogether dispensed with without judicial impropriety; for not specific parties, indeed, but all parties interested are to have opportunity, so far as conveniently may be, to come in and present the merits of their claims resting on the property. Constructive notice may not infallibly reach all interested parties, yet it is apt to do so, in the case, at least, of valuable property. And HALL, J., in a case previously cited, very clearly remarks: “The distinction between proceedings purely *in rem*, and those of a limited character [as attachments] which have been mentioned, I think, is strongly and plainly marked. The object and purpose of a proceeding purely *in rem*, is, to ascertain the right of every possible claimant; and it is instituted on an allegation

¹¹ *Mankin v. Chandler*, 2 Brock., 127.

¹² *Crondson v. Leonard*, 4 Cranch., 437.

¹³ *Monroe v. Douglas*, 4 Sandf. Ch., 182.

¹⁴ *The Globe*, 2 Blatchf., 431.

that the title of the former owner, whoever he may be, has become divested, and notice of the proceeding is given to the whole world, to appear and make claim to it. From the nature of the case, the notice is constructive only as to the greater part of the world; but it is such as the law presumes will be most likely to reach the persons interested, and such as does, in point of fact, generally reach them. In the case of a seizure for the violation of our revenue laws, the substance of the libel which states the grounds on which the forfeiture is claimed, with the order of the court thereon specifying the time and place of trial, is to be published in a newspaper, and posted up a certain number of days, and proclamation is also made in court for all persons interested to appear and contest the forfeiture. And in every court, and in all countries whose judgments are respected, notice of some kind is given. It is, indeed, as I apprehend, just as essential to the validity of a judgment *in rem*, that constructive notice, at least, should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property, where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."¹⁵ And STORY, J., very forcibly says on the same matter: "There is another element which it seems to me constitutes an essential ingredient, in every case where the sentence of a foreign court *in rem* is sought to be held conclusive as to the title to the property, and as to the facts upon which it professes to be founded. That element is, that there have been proper judicial proceedings upon which to found the decree; by which I mean, not that there should be regular proceedings according to the forms of our law, or even of the foreign law, but that there should be some certain written allegation of the offense, or statement of the charge, for which the seizure is made, and upon

¹⁵ *Woodruff v. Taylor*, *supra*.

which the forfeiture is sought to be enforced, and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives, or agents, may know what is the offense with which they are charged, and may have an opportunity to defend themselves, and to disprove the charge. It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charges on which the condemnation is sought shall be specific, determinate, and clear. If a seizure is made and a condemnation is passed without the allegation of any specific cause, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defense, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice, or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes, and then hears the party—*Castigatque, auditque*. It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice, it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law; and is but a solemn fraud if it is clothed with all the forms of a judicial proceeding. I hold, that if it does not appear upon the face of the record of the proceedings *in rem*, that some specific offense is charged for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification, or monition, acting *in rem*, or attaching to the thing, so that the parties in interest may appear, and make defense, and in point of fact the sentence of condemnation has passed upon *ex parte* statements, without their appearance, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated

in the tribunals of foreign nations as importing verity in its statements, or proofs."¹⁶

The New Jersey equity court, however, holds that notice is entirely unnecessary, as to the collateral conclusiveness of such judgments; for the reason that the judicial authority arises simply from the presence of the *res* within the jurisdiction, and the court says that if a non-resident objector could be allowed to urge that notice was not given according to law, in a collateral proceeding, resident objectors could urge that they had not personal notice, and declares that "it certainly needs no reasoning to demonstrate that such a competency in litigants to challenge the various steps of the procedure after the final result, would render such result practically worthless. From the evident necessity of preventing the uncertainty with regard to the stability of legal proceedings in their concluded form, which would otherwise have supervened, the doctrine of estoppel by record came naturally into existence."¹⁷ But the better doctrine certainly is, that which requires notice to be given. It is true, an objector—either resident or non-resident—may urge the want of public notice, but not of private or personal notice; which latter is not necessarily contemplated by the law in such proceedings.

SEC. 559. The conclusiveness above contended for by the New Jersey Court may be sufficiently secured by shielding from judicial criticism collaterally all mere irregularities after the proclamation, and the actual statement of the cause of forfeiture to the court. "When a foreign judgment or decree *in rem* comes in question here," says the New York Court, "the inquiry is not, was the defender therein served with process, or did he appear in the suit? as it would be if the foreign proceeding had been to establish a personal demand against him; but the question is, did the *forum rei sitæ* proceed according to its own municipal laws, in pronouncing such judgment, or decree? In effect, we should treat the judgment of a foreign court acting *in rem* within its appropriate power

¹⁶ *Bradstreet v. Insurance Co.*, 3 Sumn., 607.

¹⁷ *McCahill v. Insurance Co.*, 26 N. J. Eq., 535.

and jurisdiction, with the same respect, and concede to it the same consequence that we would to similar judgments of our sister states. We should allow the party contesting its validity to show that it was procured by fraud, or that it is void on its face, or void by the local law *feri rei judicatæ*. But such party cannot be permitted to show that he never had any notice of the suit, otherwise than by showing that the notice prescribed by the local law was not given, thereby proving the judgment to be void by that law. Actual notice in suits *in rem* is not required to be given to absentees in any system of municipal law with which I am acquainted. Nor can the party be allowed to show that there are errors of law on the face of the judgment; for that would compel our courts to sit in review on the adjudications of the foreign tribunal. When the foreign judgment produced in evidence appears to be regular in form, and to contain the essential parts of the adjudication of the controversy, made between proper parties, the burden of showing its invalidity rests upon the party who desires to impeach it. This principle applies also to foreign judgments *in personam*, where the latitude of impeachment is much more extensive than it is in the instance of judgments *in rem*.¹⁸

SEC. 560. Where a vessel was condemned, belonging to citizens of the United States, for an alleged breach of a blockade, by an admiralty court in the Kingdom of Hayti, it was held to be invalid, because no libel was filed, and no judicial forms observed, and no notice given. PARKER, Ch. J., said in regard to it, "The decree offered in this case as conclusive evidence of a violation of blockade by the vessel insured, cannot be held so to operate. Indeed, it may be doubtful whether it ought to have been admitted at all. Waiving all question as to the character of the government under which the seizure of the vessel and the decree of forfeiture took place, it certainly is essentially defective when attempted to be applied to this contract of insurance. For it does not appear that any libel was filed, any monition issued, any hearing had, or that any of those formalities had taken place which are necessary to give

¹⁸ *Monroe v. Douglas, supra.*

a conclusive operation to decrees of foreign courts. For aught that appears from the copy of the proceedings before us, the forfeiture was decreed by mere arbitrary power without any trial, and some of the forms of the justice used in civilized countries had been assumed without any regard to the substantial requisites of a judicial inquiry."¹⁹

SEC. 561. As in other cases, the jurisdiction of a court acting *in rem*, is always liable to impeachment. And the leading element of such jurisdiction is the situation of the thing acted upon, which must be within jurisdictional limits. Thus STORY, J., in a case previously cited, says: "That the sentence of a foreign court of admiralty and prize *in rem* is, in general, conclusive, not only in respect to the parties in interest, but also for collateral purposes, and in collateral suits, not only as to the direct title and property in judgment, but also as to the facts on which the sentence professes to proceed, although formerly subject to much doubt and controversy, is now a point fully established in the courts of England, and the courts of the United States. It is sufficient, on this subject, to refer to the cases of *Crandon v. Leonard*, 4 Cranch, 434; *Rose v. Himely*, 4 Cranch, 241; and *Hudson v. Guestier*, 4 Cranch, 281. It does not strike me that any sound distinction can be made between a sentence pronounced *in rem* by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*. In each case, the sentence is conclusive as to the title and property, and it seems to me that it must be equally conclusive as to the facts on which the sentence professes to be founded. This, I think, is the settled doctrine in England, and in the courts of the United States. It is a just result from the whole reasoning in *Rose v. Himely*, 4 Cranch, 241; *The Mary*, 9 Cranch, 126, 142 to 146; and *Gelston v. Hoyt*, 3 Wheat., 246.

"Such is the general rule. But still it proceeds upon the ground that the court pronouncing the decree had jurisdiction over the cause, and that the thing was either positively or constructively in its possession, and submitted to its jurisdiction.

¹⁹ *Sawyer v. Insurance Co.*, 12 Mass., 302.

Even in cases of prize, if the vessel has never been captured at all, or if, after capture, she is rescued, or recaptured, so that she is no longer under the dominion or possession of the captors, the sentence of a court of prize professing to condemn her, would be a mere nullity. In respect to municipal seizures, the same rule must apply. The property must either be seized, or be brought within the territorial jurisdiction, or, at all events, must be in the possession, or under the control, of the seizers, so as to be positively or constructively subjected to the dominion of the seizing sovereign and his tribunals; otherwise, the sentence pronounced will be a mere nullity, founded in usurpation. In respect to the jurisdiction of courts of prize acting *in rem*, as they are courts sitting under the law of nations, the courts of other nations are competent of themselves to inquire into and ascertain whether there has been any excess of jurisdiction, or not, without any resort to the laws of the particular country where the tribunal is established. But in respect to municipal courts acting *in rem*, but deriving their authority solely from the territorial laws of the sovereign, they are, and must, from the nature of the case, be presumed to be the best judges of the nature and extent of their own jurisdiction, and of its just and legitimate exercise. Their judgment, therefore, affirming that jurisdiction, must ordinarily be conclusive upon all foreign tribunals, subject, however, to this reserve, that the *res* is either within the territory, or is positively or constructively in the possession of the sovereign, or his officers, so that the jurisdiction can, according to the law of nations, rightfully attach in such tribunals. I say, ordinarily conclusive, because no foreign court can be permitted to sit as a court of errors to revise the decisions of municipal courts in the exercise of the jurisdiction conferred on them by the municipal laws. That would be to assume the final interpretation of those laws. But this doctrine again must be understood with its proper limitations that the tribunal is recognized by the sovereign of the country as competent to act in the premises, which competency

may be conclusively established from the express recognition of the sovereign, or his silent acquisition in its decrees.”²⁰

SEC. 562. But if the *res* is once within reach, so that jurisdiction attaches, a subsequent illegal removal of it will not destroy the jurisdiction. In a late case, a vessel was thus removed while an appeal from the sentence of the court dismissing the libel was pending, in direct violation of the United States statute regulating appeals. The Supreme Court said thereon: “We do not understand the law to be that an actual and continuous possession of the *res* is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court, and brought within its control, the jurisdiction was complete. A subsequent improper removal cannot defeat such jurisdiction. The present claimants are not *bona fide* purchasers setting up new interests. They are purchasers only of such interest as passed under the claims of Mrs. Price and Mr. Williams. This was the very title set up, litigated, and decided, in the Alabama suits. It cannot again be interposed, and litigated a second time, as a defense to that decree. In *Cooper v. Reynolds*, 10 Wall., 317, the court say: ‘Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree, or judgment, which the court may undertake to make in the particular case, depends upon the nature and extent of the authority vested in it by law, in regard to the subject matter of the cause.’ In the case of *The Brig Ann*, 9 Cranch, 291, Chief Justice MARSHALL says: ‘In order to constitute and perfect proceedings *in rem*, it is necessary that the thing should be, actually or constructively, within the reach of the court. It is actually within its possession, when it is submitted to the process of the court; it is constructively so when by a seizure it is held to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*. * * * * Before judicial cognizance can

²⁰ *Bradstreet v. Insurance Co.*, 3 Sumn., 605.

attach upon a forfeiture *in rem*, under the statute, there must be a seizure; for, until seizure, it is impossible to ascertain what is the competent forum. And if so, it must be a good subsisting seizure at the time when the libel, or information, is filed, or allowed. If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. It is not meant to assert that a tortious ouster of possession, a fraudulent rescue or relinquishment of the seizure will divest jurisdiction. The case put is that of a voluntary abandonment and release of the property seized, the legal effect of which must be, we think, to purge away all the prior rights acquired by the seizure.' In *Taylor v. Carryl*, 20 How., 599, the rule is thus laid down: 'In admiralty all parties who have an interest in the subject of the suit, the *res*, may appear, and each may propound independently his interest. The seizure of the *res*, and the publication of the monition, or invitation to appear, is regarded as equivalent to the particular service of process in law and equity. But the *res* is, in no other sense than this, the representative of the whole world. But it follows that to give jurisdiction *in rem* there must have been a valid seizure, and an actual control of the ship by the marshal of the court.' * * * * * We hold the rule to be that a valid seizure and actual control of the *res* by the marshal gives jurisdiction of the subject matter, and that an accidental, or fraudulent, or improper removal of it from his custody, or a delivery to the party upon security, does not destroy jurisdiction."²¹

SEC. 563. Formerly it seems to have been held by the United States Supreme Court that jurisdiction might attach although the *res* was elsewhere, in the port of another nation, or on the high seas. But this is now overruled,²² and the doctrine is as stated above.

SEC. 564. Chief Justice MARSHALL lays down the rule for inquiries into the jurisdiction of courts acting *in rem*, thus:

²¹ *The Rio Grande*, 23 Wall., 463; *Jennings v. Carson*, 4 Cranch, 23.

²² *Hudson v. Guestier*, 6 Cranch, 283; *Rose v. Himely*, 4 Cranch, 282.

"The great question to be decided is, was this sentence pronounced by a court of competent jurisdiction? At the threshold of this interesting inquiry, a difficulty presents itself which is of no inconsiderable magnitude. It is this: Can this court examine the jurisdiction of a foreign tribunal? The court pronouncing the sentence, of necessity, decided in favor of its jurisdiction, and if the decision was erroneous that error it is said ought to be corrected by the superior tribunals of its own country, not by those of a foreign country. This proposition certainly cannot be admitted in its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever. The power of the court, then, is, of necessity, examinable, to a certain extent, by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it professes to decide must be considered. But, although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty whether the situation of the particular thing on which the sentence has passed may be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question whether the vessel condemned was in a situation to subject her to the jurisdiction of that court also examinable? This question, in the opinion of the court, must be answered in the affirmative. Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter, which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If, by

any means whatever, a prize court should be induced to condemn as prize-of-war a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned arising from its being within or without their jurisdiction, as well as the constitution of the courts, may be considered by that tribunal which is to decide on the effect of the sentence. Passing from principle to authority, we find that in the courts of England—whose decisions are particularly mentioned because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation that it has in the given case jurisdiction of the subject-matter. [Special cases cited.] The manner in which this subject is understood in the courts of England, may, then, be considered as established on uncontrovertible authority. Although no case has been found in which the validity of a foreign sentence has been denied because the thing was not within the ports of the captor, yet it is apparent that the courts of that country hold themselves warranted in examining the jurisdiction of a foreign court by which a sentence of condemnation has passed, not only in relation of the thing on which those powers are exercised, at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations, and by treaties. There is no reason to suppose that the tribunals of any other country whatever, deny themselves the same power. It is, therefore, at present considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case.”²³

Sec. 565. So that, the jurisdiction must appear, and a defendant claiming a vessel under a sentence of condemnation by

²³ *Rose v. Himely*, 4 Cranch., 267.

a foreign tribunal must prove the competency of the court, if it is disputed; and especially if it appears to have been irregularly constituted, for then there is no presumption in its favor. If the constitution of a court is altogether unknown, it will be presumed to be a legal one. Where it is known, it may properly be examined, and if it has been constituted by a different authority from what is usual among civilized nations to be so exercised—as, for example, by a military commander—one who claims under the action of the court must prove the constitution thereof to have been by proper authority. The erection of courts, however, is, in all civilized nations, a sovereign act, but the authority may be delegated to subordinate agents, and even to military commanders.²⁴ Where the usual presumption exists, as is the case when nothing irregular appears in the organization of the court, the party denying the jurisdiction, or the existence of any cause of condemnation, must sustain his allegations by evidence. But it has been held that the sentence does not afford any presumption of a local or municipal statute. And so, where the cause of condemnation was stated to be for breach of the British laws regulating trade and navigation, the New York Court decided that the party who would avail himself of the sentence must show the proceedings of the court, and the existence of the local law authorizing the condemnation.²⁵ Yet, as to its own citizens, a nation has a right to authorize the seizure of their persons, or property, wherever they may be found—as upon the high seas—for a violation of its municipal laws, provided the jurisdiction of other nations is not interfered with. The high seas are considered as not subject to any exclusive jurisdiction, but to the concurrent jurisdiction of all nations, so that the sovereign authority of any nation may arrest its own subjects, or seize their property thereon, in any part of the world.²⁶

SEC. 566. The New York Court holds the general rule of conclusiveness, however, with some modification, namely, that while the sentence of a foreign admiralty court condemning a

²⁴ *Snell v. Faussatt*, 1 Wash. C. C., 271. ²⁶ *Ibid.* p. 426.

²⁵ 6 Cowen. 424.

prize according to the law of nations is conclusive to change the property, it is only *prima facie* evidence of the facts on which the condemnation proceeded, and these, therefore, can be disproved collaterally.²⁷

SEC. 567. All nations take judicial notice of what the law of nations is; and where it appears that a condemnation professedly for a breach of that law is really not for such breach, the judgment will not be binding as to other nations; but there is no judicial notice of the municipal laws of foreign countries, and these must therefore be proved as other facts.²⁸

SEC. 568. Such judgments are, like others, impeachable for fraud. On this, STORY, J., says: "Supposing the proceedings before the Mexican tribunal to be, in all respects, unexceptionable, my opinion is that the allegations in those proceedings as to the appearance of the master [of the vessel] before the court, and his being heard before the decree of condemnation, would be conclusive on the parties, and would not be traversable, or re-examinable, in the present cause. But if the defense be that the proceedings were not merely irregular and illegal, but were founded in a positive fraud, and that, in point of fact, the whole record was but a tissue of false accusations and false statements and false proofs made up to cover the fraud in which the seizing and prosecuting parties were all confederate, I should think that evidence was admissible to show that the master never was summoned, never did appear, and never was heard before the condemnation, in order to establish *pro tanto* the fraud. I know of no case where fraud, if established by competent proofs, is not sufficient to overthrow any judgment, or decree, however solemn may be its form and promulgation. But it would require the strongest evidence to establish such a defense, by testimony not only of the highest order but also free from any, the slightest, suspicion of interest or bias."²⁹

SEC. 569. Of necessity, the question of forfeiture, when

²⁷ *Insurance Co. v. Francis*, 2 Went., 68.

²⁸ *Ibid.*, 69.

²⁹ *Bradstreet v. Insurance Co.*, 3 Sumn., 604.

passed upon by a national court, cannot be litigated again in a state court. A sentence condemning or acquitting is not only conclusive, but the matter is one of exclusive and not concurrent jurisdiction, and so cannot be entertained by any other than a national forum, under the constitution of the United States.³⁰ And the question cannot be tried indirectly by an action of trespass against the seizing officers.³¹

SEC. 570. It is held that the sentence of a foreign court condemning neutral property under an edict unjust in itself, contrary to the law of nations, and violating neutral rights, and as such expressly censured by the government of the United States, does, nevertheless, change the property of the thing condemned—and even a sale before sentence will be ratified by the decree and will be good *ab initio*. Thus, a French tribunal at Guadaloupe took cognizance of the seizure of a vessel on the high seas for a violation of the Milan Decree, which was carried into the Dutch port of St. Martin's island, and there sold by order of the Dutch governor, before condemnation, and without any authority of the Guadaloupe Court. Held, that the American owner could not re-claim it after the sentence. It would seem as if our court decided this with the fear of Napoleon before their eyes. Yet the court intimates that if Congress had gone further in condemning the Milan decree than mere censure, and had ventured out beyond its protest to a positive enactment that all sentences pronounced under it should be void, the court would not hesitate to give effect to the enactment by recognizing the title of the original owner.³²

SEC. 571. Admiralty jurisdiction of titles concludes all subsequent litigation on the questions passed upon therein, as a general rule. And, moreover, if, in a former action, the nature of that title, and the manner in which it had been acquired, was adjudicated, the questions relating thereto cannot be again litigated.³³ But a sentence is not conclusive as to any facts without which it could have been pronounced,

³⁰ *Gelston v. Hoyt*, 3 Wheat., 315. ³² *Williams v. Armroyd*, 7 Cranch., 432.

³¹ *Ibid*; same parties, 13 Johns., 579. ³³ *Denison v. Hyde*, 6 Conn., 517.

and therefore which were not essential to the decision; as, for instance, that the legal title to property condemned as a prize was not in the subject of a neutral power.³⁴ The titles to vessels is a prominent branch of admiralty jurisdiction, and an admiralty court may entertain both petitory and possessory suits.³⁵

SEC. 572. The sentence of a foreign court of admiralty condemning a vessel for a breach of blockade, is held to be conclusive evidence of such breach in a subsequent action on a policy of insurance.³⁶ And even if the vessel be actually neutral, and the crew rescue it, this rescue is sufficient ground of condemnation, and is conclusive in an action on a policy against the plaintiff. The law on this subject is thus stated by PARSONS, Ch. J.: "We all concur in the opinion that there must be a new trial in this case, on account of the misdirection of the judge who sat in the trial, with respect to the legal effects of a rescue. We cannot admit the doctrine that the crew of a neutral vessel may determine for themselves that an arrest made by a belligerent is without color of right, and in consequence of such determination, may forcibly regain possession of the vessel. The belligerent having a right, by the law of nations, to visit and search neutral vessels to prevent them from leaving or entering a port of his enemy under lawful blockade, to seize and detain them if engaged in contraband trade, or knowingly violating a blockade, and to capture and carry into port neutral vessels which may be transporting the property of his enemy for the purpose of condemning such property, it would be utterly inconsistent with these rights of the belligerent to allow the neutral vessel to resist by force, or to be re-taken by her crew, whenever they might have opportunity to overpower the officers and men of the belligerent in whose custody she may be placed. General principles of policy and national law require that in such cases the neutral

³⁴ *Maley v. Shattuck*, 3 Cranch., 488.

³⁵ *The Schooner Tilton*, 5 Mason, 468.

³⁶ *Baxter v. Insurance Co.*, 6 Mass., 299, following *Goodson v. Leonard*, 4 Cranch., 434.

should submit, and rely upon the justice of the tribunals of the belligerent nations to restore him to his rights, and give him indemnification, if the party arresting has abused his power, and without any pretext or probable cause has subjected him to loss or damage. And if the tribunal should manifestly proceed upon unjust principles, the sovereign of the neutral country must interfere, and protect the rights and property of the citizens. Nor would the interest of neutral nations be, in any degree advanced by a change of the public law in this particular, for such a change would compel belligerents, on every seizure of a neutral for a supposed breach of neutrality, either to take from the vessel all the original crew, to the great disadvantage of the voyage in case there should be a release of the vessel, or to use a degree of severity in the confinement of the crew which has not hitherto been practised, which would be exceedingly injurious to them, as well as to the general commerce of the neutral from the discouragement it would occasion to mariners. Neutral powers should always be willing to allow to belligerents those rights and powers which have been established and practised upon for ages, looking to the time when, according to the ordinary course of human events, they may be obliged to claim and exercise the same for the vindication of their own rights when violated by other nations. A rescue, therefore, of a neutral vessel arrested and detained by a belligerent armed vessel for an alleged violation of neutrality, is a good cause of condemnation, and a loss happening from this cause is not within the perils insured against by the policy upon which this action is brought.”³⁷

SEC. 573. But where an insurance policy excepts from its provisions, in general terms, *risks from blockaded ports*, the most prominent inquiry is whether there is really a blockade in existence, and of this, the New York court has held that a sentence of condemnation is only *prima facie* evidence, and not conclusive. The court says in an action on a policy: “The question is, whether St. Lucas was, at the time of the

³⁷ *Robinson v. Jones*, 8 Mass., 537.

capture, a blockaded port, within the exception in the policy. This is a matter of fact, depending on a contract between our own citizens. It has nothing to do with any conflict between belligerent and neutral pretensions. It does not necessarily involve any examination into the just extent of these pretensions. It is a plain inquiry into the existence of a fact, viz., was here a loss chargeable to the existence of a blockade? A blockade may exist in fact, and yet a capture and condemnation for the breach of it be unjust from the want of knowledge in the neutral of the existence of the blockade. This case, then, needs not, and ought not, to awaken any prejudice or bias, one way or the other, as respects the object of the present suit, and there are no considerations which ought to have induced a jury to require more strict evidence of this than of any other ordinary question of fact. The court has already decided that the legality of the capture was not the question in the case. Admitting the capture and condemnation to have been illegal from the want of due proof of notice, yet, if the loss arose by reason of the port of St. Lucas being blockaded, it falls within the exception. There may be a blockade of a port in fact, unaccompanied with a previous notification to neutral nations, and, therefore, a vessel arriving within the cruising ground of the blockading squadron, and bound to the blockaded port, in ignorance of the blockade, would, in the first instance, be entitled of right to a notice to depart, and not subject to capture and condemnation; yet if the latter alternative should be adopted by the belligerent, either from a disregard to right, or from an overstrained application of the doctrine of constructive notice, the loss would still be on account of the blockade. It would be to be classed among those *risks of a blockaded port* which the insurer did not, in the present instance, assume. And in cases of blockade attended by a general notification to neutrals, it does not necessarily follow that the blockade did not exist in fact, at, or before the promulgation of the notice. It may exist *de facto*, at the date of the notice. There is nothing inconsistent or

unusual in this. The notice to the neutral governments is given to put their subjects and citizens upon their guard, and to fix afterward, with more facility and certainty, the *delictum* upon the neutral who is seized in the act of violating or attempting to violate the blockade. Thus, for instance, the notification of the blockade of Genoa was announced by the British government, on the 20th of February, 1801, as then existing, and that it had existed from the 5th of January preceding." * * * * * The evidence of a blockade of St. Lucas existing *de facto* at the time of the capture, consisted of the following items: 1. The sentence of condemnation which proceeded directly on the ground of that fact, and this sentence is *prima facie* though not conclusive evidence of the fact of the blockade," etc.³⁸

But we have already seen that the New York doctrine is exceptional, as to the facts on which a decree rests—the United States Courts and most others holding the decree conclusive on this, instead of merely *prima facie* evidence.

SEC. 574. It has been held by the Supreme Court of the United States that a sentence of condemnation upon a *vessel* as enemy's property for want of a claim, does not debar a claimant for the *cargo* subsequently to dispute the fact that the vessel was enemy's property, so far as his claim may render it necessary, because the owner of the cargo has no claim to the vessel, and, therefore, could not appear as a claimant in the action *in rem* against the vessel.³⁹

SEC. 575. Where a vessel is taken by pirates, but is afterwards sold in due course of admiralty proceedings, by some national authority, the judgment is conclusive, and the sale irrevocable.⁴⁰

SEC. 576. The proof of a will has been held to be a proceeding *in rem*, because it determined the *status* of the subject matter;⁴¹ and the judgment binds all persons whether

³⁸ *Radcliff v. Insurance Co.*, 9 Johns., 281. *Vanderhovel v. Insurance Co.*, 2 Johns. Cases, 451.

³⁹ *The Mary*, 9 Cranch, 146.

⁴⁰ *Grant v. McLochlin*, 4 Johns., 39.

⁴¹ *Woodruff v. Taylor*, 20 Vt., 73.

parties to the record, or not,⁴² and is conclusive and effectual for all purposes.⁴³

SEC. 577. And marriage and divorce are held to be matters *in rem* when adjudicated; because adjudications concerning them fix and define the *status* of the parties.⁴⁴ And, correspondingly so are matters of pedigree.⁴⁵ And matters of partition, especially as to absent heirs,⁴⁶ or "unknown owners."⁴⁷

SEC. 578. We have already mentioned the fact that attachment is only a proceeding *quasi in rem*, and, therefore, a judgment does not conclusively bind a stranger to the proceedings whose rights of property have been violated by the seizure under the writ.⁴⁸

SEC. 579. The determination of public boundaries, such as the line between two towns, or counties, is considered a proceeding *in rem*, because it relates to public interests beyond the rights of litigants, and establishes conclusively the location or *status* of the *res*.⁴⁹

SEC. 580. Although the judgments of the courts of admiralty are binding in other courts, yet the mere pendency of proceedings *in rem* therein, will not abate a personal action in a common law court; as to the title of a vessel, for example.⁵⁰

⁴² *Fry v. Taylor*, 1 Head, 595.

⁴⁷ *Kane v. Canal Co.*, 15 Wis., 179.

⁴³ *Crippen v. Dexter*, 13 Gray, 332. ⁴⁸ *Samuel v. Agnew*, 80 Ill., 553.

⁴⁴ *Greene v. Greene*, 2 Gray, 363.

⁴⁹ *Pitman v. Albany*, 34 N. H., 582.

⁴⁵ *Ennis v. Smith*, 14 How., 430.

⁵⁰ *Granger v. Judge*, 27 Mich., 406.

⁴⁶ *Lessee of McCall v. Carpenter*, 18 How., 303.

STARE DECISIS.

CHAPTER XXXIX.

OBITER DICTA.

Section 581. Rule of Obiter Dictum Explained.

582. Modification thereof.

SECTION 581. The maxim on which the topic we are about to consider rests contemplates, not whatever a court may happen to say, in a perhaps discursive argument of a cause, or even several causes, but has regard only to points and adjudications actually involved, as essential elements, in the questions in actual controversy. The Supreme Court of the United States say in regard to this: "If the construction put by the court of a state upon one of its statutes, was not a matter in judgment, if it might have been decided either way, without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contestation belongs. And, therefore, this court (and other courts organized under the common law) has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right, or title, in question between the parties. In *Cohens v. The State of Virginia*, 6 Wheat., 399, this court was much pressed with some portion of its opinion in *Marbury v. Mad-*

ison, and Mr. Chief Justice MARSHALL said: ‘It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.’ The cases of *ex parte Christy*, 3 How., 292, and *Jennes v. Peck*, 7 How., 612, are an illustration of the rule that any opinion, given here or elsewhere, cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains.”¹ In the Christy case above referred to, in which the opinion of the court was delivered by the renowned Justice STORY, Justice CATRON administered to the majority of the court a stirring rebuke on the spot, for the long dissertation given upon an abstract question, namely, the general powers of a bankrupt court, after deciding with unanimous concurrence, that the Supreme Court could not revise the proceedings of such a court. Says he: “By the 14th section of the judiciary act, this court has power to issue writs proper and necessary for the exercise of its jurisdiction; having no jurisdiction in any given case, it can issue no writ [as, for example of prohibition, which was applied for in this case]; that it has none to revise the proceedings of a bankrupt court is our unanimous opinion. So far we adjudge; and, in this I concur. For further views, why the prohibition cannot issue, I refer to the conclusion of the principal opinion. But a majority of my brethren see proper to go further and express their views at large on the jurisdiction of the bankrupt court. In this course, I cannot concur; perhaps it is the result of timidity growing out of long established judicial habits, in courts of

¹ *Carroll v. Carroll*, 16 How.. 287.

error elsewhere, never to hazard an opinion where no case was before the court, and when that opinion might be justly arraigned as extra-judicial, and a mere *dictum* by courts and lawyers, and be partly disregarded while I was living, and almost certainly be denounced as due assumption when I was no more — a measure of disregard awarded, with an unsparing hand, here and elsewhere, to the *dicta* of state judges, under similar circumstances. And it is due to the occasion, and to myself, to say, that I have no doubt the *dicta* of this court will only be treated with becoming respect before the court itself, so long as some of the judges who concurred in them are present on the bench, and afterwards be openly rejected as no authority — as they are not.” And after starting out with this breezy introduction, the learned justice proceeds, at great length, to exhibit the impropriety of the garrulous adjudication of the majority of the judges in the pending case. His reasoning on the matter is certainly incontrovertible, and highly seasonable.

In the other case referred to, there seems to have been a travelling out of the record, in order to argue whether a District Court of the United States has a supervisory power over a state court — a point manifestly not involved in the attachment case then pending.

SEC. 582. But the line must not be too sharply drawn. It does not follow that if a particular point is not exhaustively argued in a cause, a decision upon it is *obiter dictum*, where it was directly involved in the issues of law raised by a demurrer, so that the mind of the court was directly drawn to, and distinctly expressed upon, the subject.² And, in Maryland, it has been held that where a question of general interest is supposed to be involved, and is fully discussed and submitted by counsel, and the court decides the question *with a view to settle the law*, a decision made under such circumstances cannot be deprived of its authority by showing that it was not called for by the record.³

² *Michael v. Morey*, 26 Md., 261. ³ *Alexander v. Worthington*, 5 Md., 488.

CHAPTER XL.

LAW OF PRECEDENT.

Section 583. Reasoning and Illustration not Precedent.

- 584. Rule of Interpretation as to Language of a Court.**
- 585. Court equally Divided.**
- 586. Limitations need not be stated in an Opinion.**
- 587. Deliberation Needful.**
- 588. Special and General Terms.**
- 589. Single Decisions and Decisions in Series.**
- 590. Where Statute adopted by another State, its Construction also adopted.**
- 591. Rule where Statute is merely offered in Evidence.**
- 592. Decisions of the Executive Department.**
- 593. The same—Oregon Decision on the point.**

SECTION 583. We have just seen that what is said by a court entirely outside of the record, or the points necessarily involved in a case, being *obiter dictum*, does not pass into precedent. But more is needful to constitute a precedent than merely that a principle or doctrine is announced within the appropriate limits of a cause. It is a fundamental law that a precedent must be a conclusion, a decision in a cause; and not a process of reasoning, an illustration, or analogy. These latter are but means of arriving at a decision, and it is not at all uncommon for the members of a court to be fully agreed as to the conclusions arrived at, but yet to differ very materially as to the reasons and principles whereby the conclusions are sustained in the written opinions. This seems to be a law, however, for which our reporters have not the slightest respect, in many instances; they very complacently set down in the syllabus every severable passage they can lay hold of in the written opinion, and then plume themselves as highly respectable

authors, and benefactors to the profession; as well as to themselves, in the way of perquisites or fat salaries. On the fundamental law just laid down, the Indiana Court well say: "The reasoning, illustrations, and references, contained in the opinion of a court, are not authority, not precedent; but only the points arising in the particular case, and which are decided by the court. The members of a court often agree in a decision, but differ decidedly as to the reasons or principles by which their minds have been led to a common conclusion. It is, therefore, the conclusion only, and not the process by which it has been reached, which is the decision of the court, and which has the force of precedent, in other cases. The reasoning adopted, the analogies and illustrations presented, in real or supposed cases, in an opinion, may be used as argument in other cases, but not as authority. In these, the whole court may concur, or they may not. So of the principle concurred in and laid down as governing the point in judgment, so far as it goes, or seems to go, beyond the case under consideration. If this were not so, the writer of an opinion would be under the necessity, in each case, though his mind is concentrated upon the case in hand, and the principles announced directed to that, to protract and uselessly encumber his opinion with all the restrictions, exceptions, limitations, and qualifications which every variety of facts and change of phase in causes might render necessary."¹

SEC. 584. Consequently, a second fundamental law is, that language used in an opinion, whether in the reasoning, or the conclusion established thereby, is always to be explained and restricted by the case under consideration, and to that extent only is a decision fitted to serve as a precedent;² for, as the Mississippi Court justly say: "Such is the flexibility of language, and even of sentences disconnected from their context, as well as the special state of facts to which they have been applied, that in courts it has become a settled rule that all

¹ *Lucas v. Commissioners*, 44 Ind., 541, citing *R. R. v. Davidson Co.*, 1 Sneed, 695.

² *Ibid.*

adjudications are to be considered only in connection with, and as explained by, and limited to, the state of circumstances appearing in the record;"³ that is, the essential circumstances constituting the case, or that portion of the case on which a decision rests. Thus, in a case in California, where a bailee was indicted for converting money to his own use, it was held that an indictment should distinctly set forth the character of the bailment, the mode of conversion, the description of the property, and its value, and, therefore, the indictment in the case was had because it gave merely the value of the money, without specifying as a description, that it was lawful money of the United States; and the court said thereon that it "could not know that by four hundred thousand dollars was meant so much lawful money of the United States. For aught we may know, it is the currency of some other state, or nation, and not sufficient in amount to charge the defendant, under our statute, with grand or petit larceny." Afterwards, this was cited as authoritative, in a case of larceny of cattle, in which the indictment stated the value of the cattle without adding the words "lawful money of the United States." In response to this, the court said: "It is true, that the language of that opinion, taken without reference to the circumstances of the case, would bear the construction contended for; but the rule is well settled that the language of an opinion, in general, must be held as referring to the particular case decided. In that case, Cohen was indicted for converting money to his own use, whilst he was the bailee of another. The defect was in describing the thing converted. The thing stolen must be correctly described, for the purpose of identification. And when a party is indicted for stealing coin, the kind of coin must be specified. But in this case, the indictment was for stealing cattle, and the value of the animals stolen was alleged in the language of the statute. The statute defining the offense does not use the words 'lawful money of the United States.' The allegation of the value was sufficient, being as certain as the language of the statute."⁴

³ *Pass v. McRae*, 36 Miss., 148.

⁴ *People v. Winkler*, 9 Cal., 236.

SEC. 585. Although, where a court is equally divided in opinion, there is an adjudication, nevertheless, in effect—that is, the decision of the lower court is affirmed—yet it is plain no binding precedent can thus be established; but the question is to be regarded still as an open one.⁵ Such a formal affirmation, although leaving undisturbed the law of the lower court, cannot possibly have the effect of adopting that as the rule of the higher court, except as to the particular case in which the tie occurs.⁶ For, as to this, the matter is finally settled, and the court will not grant a re-hearing on the ground of the want of preponderance either way, because “the effect of such a judgment of affirmance is as conclusive upon the rights of the parties to the judgment as any other, although it is not considered as settling the question of law as to cases which may arise between other parties.”⁷ And in a case of deadlock, the Supreme Court of the United States, per MARSHALL, Ch. J., said: “In the very elaborate arguments which have been made at the bar, several cases have been cited, which have been attentively considered. No attempt will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled, but the judgment is affirmed, the court being divided in opinion upon it.”⁸

SEC. 586. As before intimated indirectly, it is not requisite, in writing opinions, to set down, in guarded terms, the particular limitations of the doctrines advanced, or the decisions made, nor to specify the conditions to which they *would not* apply. They are to be understood not merely as abstract propositions, but are to be regarded as inseparable from the issues and questions with which the court is dealing, when they are announced; and if kept within the implied restrictions and limitations logically deducible from the essential facts of the case, they become binding precedents.⁹

⁵ *Morse v. Goold*, 1 Kan., 285.

⁸ *Etting v. Bank*, 11 Wheat., 78.

⁶ *Bridge v. Johnson*, 5 Wend., 372.

⁹ *Holcomb v. Bonnell*, 32 Mich., 8.

⁷ *People v. New York*, 25 Wend., 256.

SEC. 587. When a question, after full consideration, has been deliberately determined, and there is a conflict thereon in other cases, the decision should be adhered to in the court pronouncing it, until it is definitely settled by the court of last resort.¹⁰ But, it seems, a court has the right to judge as to whether a question has been formerly considered and determined *with due deliberation*. Thus, the New York Supreme Court, when pressed with a former decision, responded: "In opposition to this doctrine, however, the case of *Wright v. Wright*, is pressed upon us, as an authoritative adjudication, which we are bound to follow. We believe in a rigid adherence to the doctrine of *stare decisis*. We regard it as necessary to preserve the certainty, the stability, and the symmetry, of any system of jurisprudence, and, therefore, if we had any reason to believe that the decision in this case was made upon deliberate consideration, and that the adoption of the reasons assigned by the judge was necessary to the decision of the questions before the court, we should certainly regard it as an authority binding upon us, and leave the error, if any there were, to be corrected in the court of the last resort. But we do not think the case of *Wright v. Wright* entitled to the authority of judgment upon the point in question. The case itself was a non-enumerated motion, a decision upon which is never regarded as *res adjudicata*. The disposition of this class of cases is constantly made upon equitable considerations, which address themselves to the discretion of the court; and relief is frequently granted on equitable terms, against the strict legal rights of the parties. The judgment in this case was merely a refusal to stay the proceedings in a cause after verdict, to enable the applicant to move for a new trial, upon newly discovered evidence; and, the decision might well have been placed upon the ground assumed by the circuit judge in refusing to grant the same order, which, in no respect, involved the principle now under consideration. It is manifest, from the report of that case, that it did not receive a deliberate examination, either by the counsel or the court. No one of the

¹⁰ *Greenbaum v. Stein*, 2 Daly, 226.

cases upon the subject of gifts *causa mortis* appears to have been brought to the notice of the court, and none of the objections which, in other cases, have been held fatal were alluded to by the judges, in the brief remarks that fell from them, in disposing of the motion. For these reasons, we consider ourselves at liberty to dispose of this interesting and important question, unembarrassed by the authority of the decision in *Wright v. Wright*. We may also add that that case has been reviewed, and its conclusions disapproved, by the courts of Massachusetts, Connecticut, and Vermont.”¹¹ Again, the court say, in a later case, in regard to the same matter: “We look into these opinions in vain for the evidence of that solemn argument, and mature deliberation, which, upon the doctrine of *stare decisis*, should give to this case the weight of authority sufficient to foreclose the judgment of all other tribunals upon the same question.”¹²

SEC. 588. A single judge, holding a special term, is not authorized to depart from a decision rendered at general term of the court, even if he has always disapproved of it.¹³ And that a decision is made at a general term in another district, does not render it less binding, for its force is not bounded by district lines,¹⁴ unless evidently the decision was the result of mistake, or is so clearly erroneous as to leave no doubt of the error.¹⁵

SEC. 589. It is usually regarded as more conclusive to have a *series* of decisions than a single one. But the law of precedent has less relation to mere numbers, than to the decisive nature of the conclusions announced, and the deliberation and care with which they have been investigated. Yet an error in a single decision may usually be more readily reached and corrected than when it runs through a series, or has been established for many years, and generally adopted as a rule of property. Thus, a single decision, made without noticing a

¹¹ *Harris v. Clark*, 2 Barb., 101.

¹² *People v. Brooklyn*, 9 Barb., 544.

¹³ *Adams v. Bush*. (No. 2), 2 Abbott Pr. (N. S.), 118.

¹⁴ *Loring v. Gutta Percha Co.*, 30 Barb., 646.

¹⁵ *Bentley v. Goodwin*, 38 Barb., 640.

statute, and, in fact, contravening the statute, cannot be invoked as of indisputable authority, and more especially in a matter of practice,¹⁶ although, as to mere formal modes of procedure, uniformity is, of course, the paramount law, and decisions concerning them are rarely disturbed though erroneous in some particulars.¹⁷

Justice BRONSON, in a dissenting opinion,¹⁸ states very broadly that "it is going quite too far to say that a single decision of any court, is absolutely conclusive as a precedent. It is an elementary principle that an erroneous decision is not bad law, it is no law at all. It may be final upon the parties then before the court, but it does not conclude other parties having rights depending upon the same question." But this is "going quite too far" against the decisiveness of erroneous decisions. If one such decision is no law at all, then two, three, or a hundred will not be so; for by adding ciphers together, you can never produce unity, and, in the case before us, then, can never arrive at a precedent. Yet we shall have occasion to consider erroneous principles, as immovable precedents hereafter. But, as he spoke with particular reference to the former nondescript Court of Errors modeled somewhat after the English parliamentary appellate court, and therefore made up in part, or rather chiefly, of senators trained to politics rather than judicial precision, and speaking at large in the pending cause as if it were a political question, and not formally writing out opinions like the judges of a Supreme Court, his remarks are, after all, not very far wide of the truth. Yet the rule is, as I have intimated, that "if a decision [a single one] is made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration, or exposition of the law, and to regulate their actions and contracts by it. * * * Even a series of decisions are not always conclusive evidence of what is law, and the revision of a decision very often resolves itself into a mere

¹⁶ *Duff v. Fisher*, 15 Cal., 282.

¹⁸ *Butler v. Van Wyck*, 1 Hill, 438.

¹⁷ *Sauer v. Steinbamer*, 10 Wis., 370.

question of expediency, depending upon the consideration of importance, of certainty in the rule, and the extent of property to be affected by a change.”¹⁹

But a recent and solitary opinion by a judge, however eminent, is not to be regarded, in general, as establishing a new doctrine, even if he has elaborately considered it, and especially if this is itself directly inconsistent with prior decisions. The New York Supreme Court says, in a certain case involving the right of property in manuscripts, concerning a decision thereon by the chancellor: “In proceeding to examine, as we now propose, whether it is possible to reconcile this opinion of the late chancellor with the law as settled by prior decisions, and among these the very cases to which he has himself referred, we must not be understood as meaning to detract, in any degree, from the weight and authority to which his decisions, as those of a very able, learned and laborious judge, are generally and justly entitled. The judges of this court have frequently manifested the high sense which they entertain of his judicial merits, and it is with reluctance that we dissent, on any occasion, from any deliberate judgment which he has pronounced. But we deny that a recent and solitary decision of any judge, however eminent, ought to be regarded by us as conclusive evidence of the existing law, and we deny that we are bound by the decisions of the chancellor, in the same sense in which we are bound by those of the court of ultimate resort. We stand now in the same relations to the court of appeals, as that in which he stood to the court of errors, and in the cases in which we exercise an equitable jurisdiction have succeeded to all the powers which he possessed in similar cases. We have, therefore, exactly the same right to review, and, when convinced that errors have intervened that ought not to be perpetuated, to overrule his decisions that he himself and his successors in office, had not the court of chancery been abolished, might, and would have exercised. It is known to us all that the cases are numerous in courts of equity, as well as of

¹⁹ *People v. Brooklyn*, 9 Barb., 543.

law, in which judges have felt it their duty to reconsider and reverse their own decisions, and those of their predecessors; and deplorable, indeed, would be the actual state of the law (as none who has examined the valuable treatise of Mr. Greenleaf on overruled cases will doubt), had not these powers of revision and correction been frequently and firmly exercised. We must all remember that the judgment in *Hoyt v. McKenzie*, from the sanction which it apparently gave to a very dishonorable proceeding, excited general surprise and regret, so that even those who admitted its legality were anxious to relieve the law from the reproach which it occasioned. We are convinced that this reproach of giving a sanction to immorality is one to which the law was never justly liable, and from the continuance of which it ought therefore to be freed.”²⁰

SEC. 590. It has been held that where the common law has been adopted as the rule of decision in a state, the adjudications in regard to a particular matter relating to morality or public policy, settling a principle in a manner regretted expressly by the English judges, must be followed, even where the question for the first time comes before the state court, whose business it is to enforce the established common law rule until the legislature shall see fit to change it by express enactment.²¹ And, on the same principle, it is the general rule that where a state adopts a statute of another state, it adopts also the construction placed on that statute by the courts of the state, because it is regarded as a conclusive presumption that the legislature, in passing the act, knew what construction had been placed upon it by the courts of the state whence it was borrowed.²² As to English decisions, since our revolution, they are to be duly respected, indeed; unlike the feeling and action of the justice of the peace, who, on motion of an attorney, promptly overruled Blackstone on the ground that we had succeeded in emancipating ourselves from the dominion of British laws by the revolution. But they are not to be regarded as *authoritative precedents*. Thus, Chief Jus-

²⁰ *Woolsey v. Judd*, 4 Duer, 389.

²² *Bemis v. Becker*, 1 Kan., 248.

²¹ *Johnson v. Fall*, 6 Cal., 361.

tice MARSHALL says: "The rule which has been uniformly observed by this court in construing statutes, is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these states. By adopting them they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed to the time of our separation from the British Empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however we may respect subsequent decisions—and certainly they are entitled to great respect—we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to both countries, we do not hold ourselves bound to fluctuate with them."²³

SEC. 591. But where a statute is not adopted from another state, but is merely offered in evidence, a court will consult the decisions of the state where the statute exists in order to obtain aids to a correct construction, but will not regard those decisions as binding and authoritative expositions of the statute.²⁴ And, in no case, are adjudications outside of the state authoritative, except in proper cases those of the United States Supreme Court, although, of course, they are to be considered with much respect, and followed if they appear to be warranted by the fundamental principles of the common law.²⁵

SEC. 592. As the judicial department is only one part of the government, it sometimes becomes a practical question how far courts are to be bound by the decisions originating in, or made by co-ordinate branches of the government; or how far state courts are bound by the findings of the executive department of the national government.

SEC. 593. The Oregon Court, per DEADY, J., says of this

²³*Cathcart v. Robinson*, 5 Pet., 280. ²⁵*Caldwell v. Gale*, 11 Mich., 84.

²⁴*Nelson v. Gorec's Adm'r*, 34 Ala., 566.

matter, very justly: "When Congress, by the act of 1848, organizing the territory of Oregon, said that the laws of the United States should be in force in said territory, 'so far as the same or any provision thereof, may be applicable,' they did not mean that any particular law of the United States should be in force here, but only such as should be *determined* 'to be applicable.' Under this state of things, authority is necessarily given to the courts of the country, and it becomes their duty whenever the question arises, to decide what laws were in force, and what were not. Doubtless, any administrative department of the government—the land-office, for instance—charged with the duty of disposing of the public lands in this territory, may be called upon to decide the same questions, but I respectfully submit that while their decisions may operate to pass the title out of the United States, it does not conclude the courts, in a proper case, when parties are before the court claiming under conflicting laws of the United States, or *any* law of the United States, from deciding what laws were *applicable*, and, consequently, in force, and what were not, at a particular time, independently of the decision of said department, or even adversely to it."²⁶ But matters of a purely political or executive nature are not meddled with by the court and decisions on them by the appropriate departments are not examinable at all.

²⁶ *Lownsdale v. Portland*, 1 Oregon, 390.

CHAPTER XLI.

NATURE AND IMPORTANCE OF THE DOCTRINE OF STARE DECISIS.

Section 594. Necessity of the Rule.

595. Objection urged against it and the Answer.

596. When decisions may be Changed.

SECTION 594. I suppose it might be considered as a kind of legal axiom that courts should not exercise their jurisdiction, in any random manner, for this would speedily land everything in "confusion worse confounded." Of necessity, they must have certain fixed land marks approaching correctness though not infallibly perfect; and should be guided by these, even though a rigid adherence to them might, at times, work individual hardship. Those land marks are, of course, prior decisions, serving as precedents not lightly to be changed. Says the California Court, on the matter of hardship: "This case may be a hard one, but it forms no reason why the former decisions should be disregarded. The frequent instances in which courts have relaxed rules to avoid the consequences of cases like this have done more to confuse and complicate the law than all other causes put together. A rule once established and firmly adhered to may work apparent hardship in a few cases, but in the end will have more beneficial effect than if constantly deviated from."¹ And again: "Courts are permitted to exercise a wide discretion, and judges are not expected, or required, to overturn principles which have been considered and acted upon as

¹ *Giblin v. Jordan*, 6 Cal., 418.

correct, thereby disturbing contracts, and property, and involving everything in inextricable confusion, simply because some abstract principle of law has been incorrectly established in the outset. The books are full of cases, in which learned judges have acknowledged the errors committed by themselves, or their predecessors, and at the same time refused to overthrow the rule established. That judge who, from petty vanity, and for the sake of showing himself more wise and learned than his predecessors, would overturn a rule which for years had settled the rights of property should be regarded as the common enemy of mankind; and unworthy of the high trust that had been confided to him.”² The New York Court, speaking of the maxim *stare decisis et non quieta movere*, says: “The decisions of this court, while unreversed, always form the absolute law of the cases, and enter, with very decisive effect, into the body of precedents. They must, from the nature of our legal system, be the same to the science of law, as a convincing series of experiments is to any other branch of inductive philosophy. They are, upon being promulgated, immediately relied upon as to their character, either as confirming an old, or forming a new, principle of action, which, perhaps, is at once applied to thousands of cases. These are continually multiplying, throughout the whole extent of our jurisdiction. Numerous and valuable rights, offensive and defensive, may be claimed under them. And I have no doubt this remark is peculiarly true of the decision in *Clark v. Luse*. That decision, moreover, like all others made upon the subject of statute construction, even should it be reversed by the court of dernier resort, would still, by force of another statute, be itself equal to a legislative enactment concerning the particular case, for the purpose of protecting all persons who may have, in the meantime, acted under it, in good faith, against any penalty or forfeiture. (2 R. S., 499, 2d ed., § 66.) Independent of this statute, Sir WILLIAM JONES has written an excellent commentary on the maxim *stare decisis*, etc., by way of reply to a

² *Welch v. Sullivan*, 8 Cal., 188.

remark of POWELL, J., who said ‘nothing is law that is not reason.’ ‘This is a maxim,’ says Jones, ‘in theory, excellent; but in practice, dangerous; as many rules, true in the abstract, are false in the concrete. For, since the reason of Titius may, and frequently does, differ from the reasoning of Septimius, no man who is not a lawyer would ever know how to advise, unless courts were bound by authority as firmly as pagan deities were supposed to be bound by the decrees of fate.’ (Jones on Bailment.) The Court almost always in deciding any question creates a moral power above itself. And now, when the decision construes a statute, it is legally bound, for certain purposes, to follow it, as a decree emanating from a paramount authority, according to its various applications, in and out of the immediate case. And I take it that this would be so of such a constructive decision, even were we to rule it as erroneous by a subsequent one.”³ “It should require very controlling considerations to induce any court to break down a former decision, and lay again the foundations of the law.”⁴ For it is a sacred duty in a court to adhere to decisions which have become a rule of property, unless there are the most convincing and overwhelming reasons for overruling them.⁵ Indeed, unsettling titles by wavering decisions may easily produce the results of the most irremediable injustice. Hence, unless the evil to be apprehended from adhering to a decision or a series of decisions is manifestly greater than that which might proceed from a departure, no change should ever be made. This ought especially to be the inflexible rule as to all questions likely to arise in regard to the purchase or sale of real estate.⁶

SEC. 595. Sometimes an inconsiderate objection is made, even in a sneering way, against the adherence of courts to musty, mouldy authorities, and antique forms and customs, whereby they seem to be wedded to errors and absurdities sanctioned and venerated merely because they have the flavor of age

³ *Bates v. Relyea*, 23 Wend., 340.

⁴ *Hogatt v. Bingaman*, 7 How. (Miss.), 569.

⁵ *Lindsay v. Lindsay*, 47 Ind., 286 and cases cited.

⁶ *Boon v. Bowers*, 30 Miss., 256.

about them, while everything else is revolving in the whirl of progress. Undoubtedly, there is some point in the censure, both as to statutes and adjudications; as, for example, in the law of descent, in some states, where it is provided that if a man dies intestate, leaving a wife and no children, she can have only one-half the real estate, although it may have been acquired by means of her co-operative industry and economy; and the other half will rather escheat for want of collateral heirs, than descend to her whose right ought to be paramount to all others. But the objection may easily be carried too far, and set everything afloat, without chart or compass. There ought to be established standards of judgment, and it is too much to require that these shall be absolutely infallible, since infallibility belongs not to man, or any of his works. Conservatism is quite as needful, in the movements of society, of politics, of science, of law, and of everything in which mankind has a general interest, as progress is. And it is needful also to demand due credentials from every innovation, and to receive propositions of change with slow deliberation, although without prejudice, and without a bitter persecuting spirit, with which poor human nature has unfortunately always been too prone to hail substantial and permanent reforms, even in the important practical sciences, as medicine, as well as in matters relating to the highest interests of men, as religion. Conservatism and progress should be, though opposite yet co-operative, forces, constantly in action, like the centripetal and centrifugal forces of the solar systems of the universe, wherein, through the agencies of these combined opposing forces, or laws of nature, established by the Creator for the wisest ends, the vast complicated scheme of creation proceeds in the most beautiful order and exquisite harmony!

And it is highly proper that time should largely enter into the authority, the sacredness, and the veneration attaching to customs and rules established by the legal wisdom and learning of former sages of the law. For the longer a rule has continued, the more thoroughly has it inevitably become interwoven

with the business and property interests of the community at large; and, therefore, the more disastrous must be a change, especially a sudden change. And the Supreme Court of the United States have well said: "We do not deem it necessary, now, or hereafter, to retrace the reasons, or the authorities on which the decisions of this court in that, or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the states have followed, and this court has never departed from them. They are rules of property on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents, by order of those courts to whom the laws of the states confide full jurisdiction over the subject."⁷

SEC. 596. Hence, when once a principle has been fully recognized, it should not be changed, except it is found to be unbearably wrong, or else it is changed or abrogated by the legislature,⁸ to whom the correction of errors ought usually to be left as to long-established principles acted upon as a rule of property.⁹ "The rule of *stare decisis*," says the Texas Court, "so far as it applies to decisions of our own court, should not be disregarded, but on the fullest conviction that the law had been settled wrong, and, even then, we should pause and consider how far the reversal would affect transactions entered into and acted upon, under the law of the court."¹⁰ For there are rules concerning which it is more important that they should be in some way settled, than that they should be settled in any particular manner.¹¹ However, the authority of the legislature is always paramount, and a rule can be impera-

⁷ *Grignon's Lessee v. Astor*, 2 How., 343.

⁸ *Lemp v. Hastings*, 4 Greene (Iowa), 449.

⁹ *Emerson v. Atwater*, 7 Mich., 23.

¹⁰ *Sydner v. Gascoigne*, 11 Texas, 455.

¹¹ *Ewing v. Ewing*, 24 Ind., 470.

tively abolished by statute,¹² although even this should always be done with a saving of intervening rights. And any law regulating legal procedure can be repealed without impairing the obligations of contracts made under it, in the sense of the constitutional restriction, notwithstanding the repeal may operate upon such existing contracts, so as to contract the remedy applicable to them on breach thereof.¹³

¹² *Freibroth v. Mann*, 70 Ill., 523.

¹³ *Muse v. Goold*, 1 Kern., 292.

CHAPTER XLII.

ERRONEOUS PRECEDENTS AS RULES OF PROPERTY.

Section 597. Actual settlement of a Question more important than How it is Settled.

- 598.** Single Decision and a series of Decisions.
- 599.** Rule as to series or single Decisions.
- 600.** Application to Election Matters.
- 601.** Presumption.
- 602.** General Rule stated.
- 603.** Decisions of Inferior Courts.

SECTION 597. We have already stated, in the last section preceding, that it is of less importance that some rules be settled in a particular way, than it is that they should be settled in some way; and that where a decision or series of decisions has become a rule of property, or a basis of contracts, it will not readily be changed. The Indiana Court in speaking of a rule of descent in that state, which had been assaulted by forcible argument, say, on this point, aptly discriminating between property rules, and others: "This position so forcibly put addressed to this court before the decision in the case of *Martindale v. Martindale*, 20 Ind., 566, would have been entitled to grave consideration, and it is, indeed, difficult to see how it could have been met by legal argument. But there are some questions in law, the final settlement of which is vastly more important than how they are settled; and, among these, are rules of property long recognized, and acted upon, and under which rights have vested. It must be admitted that our law of descents, among the most important on our statute book,

is not remarkable for precision and clearness, and that vexatious questions are often occurring requiring judicial interpretation of this statute. We cannot change a decision without producing confusion in titles, as the ruling would necessarily relate back to the time the law came in force. But if the canon of descent, as settled by the determination of the court of last resort, is unjust, or even distasteful, the legislature can change the rule by a new statute, without interfering with vested rights. As now constituted, however much we may differ from the opinions of our predecessors, we shall not introduce doubt and confusion into questions of property, by overruling the previous decisions of this court. We have had occasion, in the last few months, to overrule a number of cases, but only in that class in which the rulings operate upon the future, and not upon the past, and which, in our opinion, will be attended by unmixed good.”¹

SEC. 598. It will be seen that the above relates apparently to a single decision becoming a rule of property. But where there is a series of such, it is usually to be regarded as absolutely impregnable, except by legislative act. The same court — Chief Justice GREGORY, who wrote the opinion from which the extract in the preceding section was taken dissenting on some ground not stated — thus reasons on this matter: “The question at the threshold, is whether a rule of property thus repeatedly declared by the court of last resort, after earnest contest, and it must be supposed upon the most careful deliberation, should be deemed open to further controversy. The repose of titles is important to the public. Upon the faith of these decisions, our people have, for a considerable period of years, invested their money in real estate, the titles to which they were thus again and again assured, were not liable to be disturbed. There must be a just basis of confidence in the stability of judicial decision, somewhere in the history of a controverted legal question, when it may be confidently relied on that the question is settled. It is not always that the courts may freely inquire, in determining a case before them, what is

¹ *Rockhill v. Nelson*, 24 Ind., 424.

the law? Sometimes, investigation should stop when it has been ascertained what has been decided on the subject. We think that the doctrine of *stare decisis* should be applied to the question now presented. Such is its relation to the interests of our people, among whom real estate is so much an article of traffic, that it is not possible to estimate the extent of the evil which would follow a decision of this court, now overruling *Story v. Clem*, and the cases which followed it. If the doctrine of those cases be admitted to be wrong, it is yet quite obvious that it has already accomplished most of the harm that ever can result from it, while a change now would sow a wide crop of serious evils to the injury of those who are innocent, and who have purchased and sold real estate upon the faith of a doctrine declared by this court no less than half a dozen times within the last ten years.”² And the Missouri court say, *per Wagner, J.*: “The counsel for the plaintiff admits that these authorities are directly against him, but asks this court to review the question and determine the law otherwise; this we are not at liberty to do. The law has been settled for many years, it has become a rule of property, and titles have been vested on the strength of it. Under such circumstances, the error would have to be most palpable to justify this court in overruling previous decisions. The stability of judicial decisions is of the utmost consequence, as on them reposes the security of property, and they are not to be tampered with to suit the views of different persons. I am aware that there are to be found most respectable cases in other states, holding a doctrine somewhat different from the rulings of this court, and were the question *res nova* they might be entitled to serious consideration. But it is no longer debatable, or open, and we are unwilling to unsettle our own laws because some other courts have entertained different views.”³ And the Ohio court say: “It is very evident that the simplest justice to our predecessors, as well as the public, should prevent us from interfering with decisions deliberately made,

² *Harrow v. Myers*, 29 Ind., 470.

³ *Reed v. Ownby*, 44 Mo., 206.

merely because a difference of opinion might exist between them and us, upon a doubtful and difficult question of construction.”⁴ The two grounds of justification in departing from even a single decision which has become a general rule of property within a certain line of dealing, are (1) the necessity of preventing continued injustice, (2) the necessity of vindicating clear and obvious principles of law. Where these do not exist, a proposition for change cannot be entertained. And as it appears from the foregoing quotations more particularly in relation to the descent or alienation of real estate, where decisions have become a rule of regulation therein, that rule should be rigidly adhered to unless it be manifestly wrong, unjust and vexatious.⁵

SEC. 599. I suppose, however, that in general, a single isolated solitary decision, even if it does pertain to real estate titles, will not constitute a fixed immovable rule. It usually requires a series to place any doctrine upon impregnable ground.⁶ Nevertheless, something depends on the length of time a single decision has continued, and yet more upon the actual fact that it has become a rule of property generally in community and has entered into vested rights; for the maxim does not depend merely upon a multitude of concurring adjudications for its binding force. And so where, in California, a single decision affirmed the validity of a grant embracing several square miles of land and had stood eight years, so that many and important rights had been acquired under it, the court refused to listen to an impeachment of it, and said: “That decision has become a rule of property with reference to this land, and many parties may have purchased portions of it during the last eight years on the faith of the adjudication. Certain it is, from the number of parties to this and the other suit referred to, decided at this term, that many persons are interested in the lands in controversy. To overturn the former adjudication, under such circumstances, because the majority of the present court might arrive at a

⁴ *Kearney v. Buttles*, 1 Ohio St., 366.

⁶ *Duff v. Fisher*, 15 Cal., 382.

⁵ *Lion v. Burtiss*, 20 Johns., 487.

different conclusion, than that attained by their predecessors — men equally well qualified to discern, and equally conscientious in the pursuit of the right, would be to trifle with the rights of litigants, and bring merited obloquy upon the administration of justice. The remarks of that distinguished author of the standard work on Contingent Remainders, Mr. FEARNE, upon the case of *Pervin v. Blake*, are very forcible and in point. He says: ‘If rules and maxims of law were to ebb and flow with the tastes of the judge, or to assume that shape which in his fancy best becomes the times; if the decisions of one case were not to be ruled by, or dependent at all upon the former determinations in cases of a like nature, I should like to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase. No reliance could be had upon precedents; former resolutions upon titles of the same kind could afford him no assurance at all; nay, even the decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security. The principles on which it was founded might, in the course of a few years, become antiquated. The same title might be again drawn into dispute, the taste and fashion of the times might be improved, and on that ground a future judge might hold himself at liberty (if not consider it his duty) to pay as little regard to the maxims and decisions of his predecessor, as that predecessor did to the maxims and decisions of those who went before him.’⁷ It is quite apparent, indeed, that because of the vast importance of real estate titles, fickleness in courts, relating to these, would be proportionately mischievous.⁸

Sec. 600. And yet the principle is not confined to these, nor even exclusively confined to property at all, but it is applied with equal force to matters relating to the claim of individuals to office by general election. Thus, at one time, the Michigan court announced the rule that the initials of a candidate, instead of the full name, vitiated the ballot. The rule

⁷ *Hihn v. Courtis*, 31 Cal., 402.

⁸ *Pioche v. Paul*, 22 Cal., 110.

stood for many years, but was finally assailed as erroneous and inconvenient. And CHRISTIANCY, J., delivering the opinion of the court, said: "This rule (recognized for a quarter of a century) has the merit of simplicity and certainty, of being easily understood and applied, leaving no room for discretion in the inspectors, and, as a general rule, is equally fair and just in its application to all parties. I do not, therefore, think it wise to disturb it by establishing another rule, which to me may seem more sound in principle, but which, in its practical application, might not be likely to produce any fairer results. The legislature have full control over this question, and may change the rule when the public sentiment shall seem to require it."⁹ For the settled doctrine is that matters relating chiefly or wholly to mere expediency, and dependent upon considerations of doubtful reasoning, should be conclusively settled in some way. And when settled, even if not on altogether satisfactory legal grounds, they should be readily changed; because the transactions of the people readily conform to it, and must be presumed to occur with reference to it, and a change often tends to unsettle substantial rights.¹⁰

SEC 601. It does not need that manifestly a decision, or a series of decisions, should have actually become a rule of property, or have entered into vested rights, in order to secure for it an immunity from ready changes. If it is to be reasonably presumed that it may have done so, or if it is merely probable that it has done so, the courts will hesitate to disturb it, and although the authorities are silent on the degree of presumption requisite to overbear an actual case of hardship before the court, I apprehend it would require a very striking case of present positive hardship, amounting to an irremediable injustice, to overcome even the ordinary presumption that a decision of some length of time standing, capable of becoming a rule of property, has actually done so. And, moreover, it has been held that former cases are to be upheld not only as to the points necessarily involved in them, and decided by

⁹ *People v. Cicott*, 16 Mich., 283.

¹⁰ *Davidson v. Allen*, 30 Miss., 421.

them, but also as to the principles which subsequent cases have declared to be established by them;¹¹ even though if the questions were *res integra*, they would probably be settled the other way.¹²

SEC. 602. "When a question has been well considered and deliberately determined," says the New York Court, "whatever might have been the views of the court before which the question is again brought, had it been *res nova*, it is not at liberty to disturb or unsettle such decision unless impelled by 'the most cogent reasons.' 'I cannot legislate,' said Lord Kenyon, 'but by my industry I can discover what my predecessors have done and I will tread in their footsteps.'"¹³

SEC. 603. Moreover, the decisions of inferior courts are binding upon superior courts, sometimes, although, perhaps, more on the principle of *res adjudicata* which relates chiefly to fact, than on that of *stare decisis* which relates to law. However, it is, at any rate, held, that the decision of supervisors in declaring and entering upon their records the result of the canvass of a vote on the removal of a county seat, rendered under an empowering statute is so conclusive that the courts cannot afterwards act upon it,¹⁴ and neither can the supervisors themselves meet afterwards and revise their former decision.¹⁵

¹¹ *Matheson's Heirs v. Hearin*, 29 Ala., 218.

¹² *Bennett v. Bennett*, 34 Ala., 55.

¹³ *Baker v. Lorillard*, 4 Comst., 261.

¹⁴ *Attorney General v. Supervisors*, 33 Mich., 290.

¹⁵ *Same v. Same*, 34 Mich., 211.

CHAPTER XLIII.

DECISIONS CONSTRUING CONSTITUTIONS AND STATUTES.

Section 604. Constitutions and Statutes.

- 605. Decisions relating to the character of a Court.
- 606 Decisions relating to Taxation.
- 607. The same.
- 608. Comparison of a Texas and a Wisconsin Decision.
- 609. Constitutionality of Statutes.
- 610. Error as to Constitutional Questions.
- 611. Decisions as Rules of Property.
- 612. The same.

SECTION 604. Similar principles govern the courts in ascertaining the legislative will and construing statutes, or construing fundamental laws, to those which control their action in announcing the doctrines of the common law, as applicable to the causes which come before them for adjudication.

SEC. 605. And where the decision is one which fixes the character of a court itself, under the constitution, as a superior, or inferior, court, it is held to be as firm as an express provision of the constitution. Thus it was decided that the Superior Court of San Francisco was an inferior court, within the meaning of the constitution of the state, and therefore, had jurisdiction so far as, and no further than, the act constituting the court gave it power. On this, the court said, when called to express its view on that question, that the matter was not an open one, and held that the decision "has remained as an exposition, by the tribunal of last resort, of the character of the court in question, for nearly five years. The community

to be affected by it, have acted upon it, in a vast number of judicial relations; rights of property have grown up under it, have changed hands and passed through numerous ramifications, until it has become imperative to regard it as a rule of property, which no power can disturb. What our present opinion may be, as to the merits of the decision in that case, is now of no consequence whatever. In construing statutes, and the constitution, the rule is almost universal to adhere to the doctrine of *stare decisis*. This is an adjudicated question, and the subject of its correctness is to us a sealed book.”¹

SEC. 606. And the matter of general taxation, or the taxation of corporations and the construction of the constitution thereon, falls under the control of the maxim *stare decisis*, and moreover overruling decisions thereon may require the enforcement of the maxim even against the first and primary construction which those overruling decisions have set aside. On this, the Wisconsin court have reasoned very elaborately and conclusively, and although the opinion is voluminous, I think I am justifiable in transcribing a large proportion of it as given on the rehearing of a cause. I cannot hope to say anything as well myself, and my *dictum* would not be authoritative at most, so that I think it always best to give the language of a court when available rather than regale my reader with any labored disquisitions of my own. Paine, J., delivering the opinion of the court, says: “Upon an ordinary question, I should content myself without adding anything to the opinions I have already filed in this case. But the positive conviction stated in granting the motion for a rehearing by those members of the court who had overruled the Waukesha county case, that it was their duty so far to retrace their steps, as to follow that case, has been assailed by eminent counsel, with great earnestness and force, and we have been urged to abide by the decision first announced in this case, and much that they say is so congenial to my own feelings and views, as to the duty of courts on constitutional questions, that I desire to state, as briefly as may be, the reasons why I am unable to

¹ *Seale v. Mitchell*, 5 Cal., 403.

assent to the conclusions they maintain. They have not discussed the meaning of the constitutional provision, but have assumed, as they well might, that upon that question we had no doubt. But they have very properly confined themselves to a discussion of the force of the maxim *stare decisis*, upon which alone our decision granting a rehearing was based.

"Their positions may be substantially stated as follows: *First*. The maxim *stare decisis*, though entitled to great force, is not imperative, but courts may properly review and change a decision once-made, if erroneous. *Second*. Even if the maxim were to be deemed imperative, we cannot properly assume that any decision was ever made by this court sustaining the validity of the law of 1854, taxing plank and railroads, for the reason that no opinion was filed in the Waukesha county case. *Third*. That upon a constitutional question as to which we have no doubt, we cannot follow a former decision against our present conviction, for the reason that to do so would violate our oath to support the constitution.

"As to the first proposition, it is undoubtedly true, in the general form in which I have above stated it. Courts frequently do, and perhaps more frequently ought to, review and change their decisions. But, because this may properly be done in many cases, it does not follow that it may in all; and, without attempting to review or cite cases in detail, I shall simply say that the following positions are fairly to be derived from the authorities, and are clearly supported by reason: That the maxim *stare decisis* has greater or less force according to the nature of the question decided; that there are many questions upon which there is no objection to a change of decision other than grows out of those general considerations which favor certainty and stability in the law. These are questions where the decisions did not constitute a business rule and where a change would invalidate no business transactions conducted upon the faith of the first adjudication. As an illustration, take a case involving personal liberty: A party restrained of his liberty claims to be discharged under some

constitutional provision; the court erroneously decides against him; the same question arises again. To change such a decision would destroy no rights acquired in the past; it would only give better protection to rights in the future. The maxim in such a case would be entitled to very little weight, and mere regard for stability ought not to be allowed to prevent a more perfect administration of justice. But where a decision relates to the validity of certain modes of doing business, which business enters largely into the business transactions of the people of a state, and a change of decision must necessarily invalidate everything done in the mode prescribed by the first, then, when a decision has been once made and acted on for any considerable length of time, the maxim becomes imperative, and no court is at liberty to change. Take a case involving the validity of certain modes of executing deeds, or wills. A decision is made, and the people act upon it for years, executing all such instruments in the manner prescribed. After that, some one raises the question again and contends that the first decision was erroneous. Admit it to have been so, would the court be justified in overruling it? Every man, whether lawyer or layman, would answer, no. It is true that, as to such questions, it was more a matter of indifference how they were first decided, than as to one like the present involving a constitutional principle, designed to secure so just an end, as equality in taxation. And I admit that this fact makes some distinction between the cases, and might justify a struggle to regain the lost ground of constitutional justice, even at the expense of some inconvenience and hardship. But it is equally as true in this case as in those supposed that the decision constituted a business rule involving the validity of the entire revenue transactions of the state, and of all the thousands of private contracts growing out of them, and having been acquiesced in and acted on for such a length of time, the error had passed beyond the reach of judicial remedy. No case can be found where any court ever changed a decision once made, conceding that the change must have such an effect. On the

contrary, there are many cases which would almost sustain the proposition that the practical construction of mere administrative officers, which has been acquiesced in for a long time without any judicial decision whatever, should, in such cases, be followed, though in conflict with the constitution. I think that doctrine has been carried too far, but where there has been a judicial decision, the reason upon which it is based then becomes unanswerable.

"It is said that in looking at the consequences of a change, to see whether we are at liberty to make it, we are setting aside the constitution, upon grounds of policy. Such a charge might be excusable in a layman; I think it is not in a lawyer. The maxim *stare decisis*, it is true, rests upon grounds of policy. But it is equally as true that the constitution itself intended that that maxim should exist in the judicial system which it established, and should be applied to decisions relating to its own construction, as well as to those relating to any other legal questions.

"The court, therefore, which follows a decision once made upon a constitutional question, in obedience to this maxim, is no more obnoxious to the charge of setting aside the constitution upon grounds of policy, than if, in obedience to the same maxim, it should follow a decision upon a statutory question, contrary to its own views, it would be obnoxious to the charge of disregarding the law on grounds of policy. The court is as clearly bound to enforce the law as it is the constitution. But in giving due effect to the maxim of *stare decisis*, though its own views would be different, it disregards neither the constitution nor the law, for both intended that this maxim should have due effect in the judicial system which they established. The question is, did the constitution itself intend that each judge should, for all time, decide upon his own interpretation, according to his own views, as though no decision had ever been made, or did it intend that such decisions once made and acted on by the people so that change would overthrow all the transactions of the past should be followed by succeeding

judges? Obviously, the latter. It is not to be expected that any express provision should be found in the constitution enjoining obedience to the maxim. But it was an established unquestioned principle in the English and American law, and every construction must be assumed to have contemplated its existence, and to have intended its enforcement. The judge, therefore, who follows a decision once made, and so long acted on, that a just application of this maxim forbids a change, although his own views of the question, if new, would have been different, is not disregarding the constitution, but obeying it according to its true intent and meaning. * * *

"But it is said that if all other grounds fail, our oaths to support the constitution imperatively require us to determine every constitutional question according to our own views of the true construction of the instrument, without regard to previous decisions. The effect of the argument urged upon this point would be to take decisions upon constitutional questions entirely out of the maxim *stare decisis*. Yet, I can see no reason for confining it to constitutional questions only. Our oaths faithfully to discharge the duties of our office as much bind us to sustain the law, as our oaths to support the constitution require us to enforce that. If, therefore, we must act only upon our own opinions, without regard to previous decisions, in the one case, we must do so in both. The correctness of the position depends entirely upon the question whether the constitution itself intended such to be the result of taking an oath to support it. Did it intend to impose upon the conscience of each judge the obligation to support the constitution by construing it always according to his own views; or did it intend that he should support it, giving due effect to previous interpretations by the tribunal established by it as its own interpreter? What I have said shows that, in my opinion, the latter was the clear intention of the constitution. I regard my oath, therefore, as binding me to respect the previous decisions of this court as binding authority, except so far as a just application of the maxim *stare decisis* may leave the court at

liberty to review its own decisions. And no government could long exist under the opposite theory. The confusion and uncertainty arising from it would be intolerable. And the people would be compelled, by a constitutional amendment, to restore this maxim to its proper place.

"We are urged by regard for our own reputations for stability, to abide by the opinion first announced, in this case, and are warned that the confidence of the people is shaken by our vacillation; but, for my own part, I am more solicitous to be right than to have a reputation of never changing. And whenever I make a mistake which the proper discharge of my duty requires me to admit and rectify, I hope that no considerations growing out of the probable effect upon my personal reputation may lead me to hesitate for a moment. Such considerations can have no place in determining judicial duty. But even if it were proper for us to act upon them here, I am at a loss to see how our reputation for stability would be re-established by making another change."²

SEC. 607. But the Texas court, speaking of the same subject of taxation, in reference to the constitutional provision, lays down some limitations, which, doubtless, may be properly admitted, to the effect that where the decisions relate not to matters of title, or contract, but abstractly to the structure of the government, the limits of executive and legislative power, etc., the doctrine of *stare decisis* does not apply. I give, however, the views of the court *verbatim*, on this important topic: "The proper determination of each of these cases depends upon the validity or invalidity of the 'Act to organize and maintain a system of public schools,' approved April 24, 1872, and the authority conferred thereby to collect the taxes, brought in question in them. The constitutionality of this law, and the liability of the tax-payers for these taxes, has been sustained by this court * * * *. It may be, therefore, thought that the question should not be regarded by us as now open for discussion—that whatever might be our views in respect to it, upon

² *Kneeland v. Milwaukee*, 15 Wis., 691.

the principle of *stare decisis*, we should hold it as definitely settled and concluded. We cannot, however, regard the rule of *stare decisis* as having any just application to questions of the character involved in these cases. This doctrine grows out of the necessity for a uniform and settled rule of property, and a definite basis for contracts and business transactions. If a decision is wrong, it is only when it has been so long the rule of action as that time and its continued application as the rule of right between parties demand sanction of its error. Because when a decision has been recognized as the law of property, and conflicting demands have been adjusted, and contracts have been made with reference to, and on faith of it, greater injustice would be done to individuals, and more injury result to society, by a reversal of such decision, though erroneous, than to follow and observe it. But when a decision is not of this character, upon no sound principle do we feel at liberty to perpetuate an error into which either our predecessors or ourselves may have unadvisedly fallen, merely upon the ground of such erroneous decision having been previously rendered.

“The questions to be considered in these cases have no application whatever to the title or transfer of property, or to matters of contract. They involve the construction and interpretation of the organic law, and present for consideration the structure of the government, the limitations upon legislative and executive power as safeguards against tyranny and oppression. Certainly, it cannot be seriously insisted that questions of this character can be disposed of by the doctrine of *stare decisis*. The former decisions of the court, in such cases, are unquestionably entitled to most respectful consideration, and should not be lightly disregarded or overruled. And in case of doubtful interpretation, a long settled and well recognized judicial interpretation, or even legislative or executive construction, within the sphere of their respective functions, might be sufficient to turn the balanced scale. But, in such case, the former decision, or previous construction, is received and weighed merely as an authority tending to convince the judg-

ment of the correctness of the particular conclusion, and not as a rule to be followed without inquiry into its correctness.

"An additional reason why we do not feel at liberty to dispose of these cases on the authority of the decisions to which we have referred in similar cases, is, that we do not think the most vital objection to the right to collect the tax in question, has been discussed or passed upon by the court in any of these cases. Indeed, if all the points discussed in the previous opinions were conceded to be correctly decided, it is, in our view of the matter, susceptible of demonstration that the judgments are erroneous."³

SEC: 608. I do not regard these decisions, quoted above from the Wisconsin and Texas courts, as irreconcilable, or even antagonistic. They can both be taken together, as a clear and irrefragable exposition of the matter of constitutional construction and we interweave them thus.. The constitution, as well as statute law and the principles of the common law, is subject to judicial decision, and, therefore, to the influence of the maxim *stare decisis*. It contemplated this maxim as one fit and necessary to be applied to the questions which should arise in regard to its own meaning, in the same manner it is applied to other subjects. Hence it is no violation of the constitution, nor of the official oaths of the judges requiring them to support it, to follow the decisions formerly made in construing its provisions. This arises from the very necessity of the case, since interpretations of the constitution are as likely to become rules of property as other decisions are. And these are based, therefore, on the same grounds, and are liable to the same restrictions, as other decisions are. And so, where they are not, on full and thorough examination, settled authoratively, and have not so entered into the intricate web of business transactions throughout the community, as that a change would introduce confusion and uncertainty as to the titles and contracts, and destroy vested rights, acquired under former decisions, the maxim does not apply—as, for example, to abstract questions of the powers of the different branches of government; and, in

³ *Willis v. Owen*, 43 Tex., 48.

such case former errors in deciding may be revised and corrected.

SEC. 609. And so, when a double exposition is required, as is not unfrequently the case, namely, of the constitution and of a law enacted under it, in order to decide upon their agreement, and *per consequence* upon the constitutionality of the statute, the maxim is in force. But there is here a check not merely from prior decisions, but from the very nature of the constitution, and the structure of the government itself. And no court has any right to affix to it, at random or deliberately, its own views of expediency, of policy, or of abstract right. The duties of a court are confined strictly within the narrow limits of ascertaining what is the actual meaning of the constitution, and it may not venture out beyond this into the wide fields of speculation as to what it might mean, or ought to mean, or wherein its provisions might be improved. For, as the Tennessee court has well said: "If the construction and administration of our laws, supreme or subordinate, were to be governed by the opinions of judges as to the genius or general principles of republicanism, democracy, or liberty, there would be no certainty in the law; no fixed rules of decision. These are proper guides for the legislature, where the constitution is silent; but not for the courts. It is not for the judiciary, or the executive department, to inquire whether the legislature has violated the genius of the government, or the general principles of liberty, and the rights of man, or whether their acts are wise and expedient, or not; but only whether it has transcended the limits prescribed for it in the constitution.

* * * * No temporary evils, be they ever so oppressive, would compensate for the introduction of a principle fraught with so much danger into our jurisprudence. Then, if we were of the opinion that the act in question was of the most unwise, unjust, oppressive, and ruinous character, and yet was not forbidden by the organic law, but fell within the scope of legitimate legislative action, we could not arrest but would be solemnly bound to enforce it. For the consequences, we are not responsible. We have no more power to

repeal, or disregard, than to make law. Our functions only extend to their construction and enforcement. But, on the other hand, it has become an axiom in our jurisprudence, now no where disputed, and everywhere adopted and acted upon, that the courts have power, and it is their duty, to pass upon the constitutionality of an act of the legislature, and declare it nugatory if there be an irreconcilable conflict. * * *

No relief can be obtained, if the charter is not transcended. Partial evil must be endured for the general good. The harmony of the system must be maintained. The judiciary, with all others, must submit to the commands of the legislature, so long as it revolves in its legitimate orbit, no matter what the consequences may be. * * * * This [the constitution] is the supreme and paramount law, before which all must bow with reverence. Over its barriers, even the legislature, with its mighty powers for good or evil, cannot pass. This limitation would be worse than useless, if there were no power in the state to decide upon their acts, and to bring them to the test, whenever any controversy arises on the subject. This delicate and important duty has been necessarily devolved upon the judiciary. How could it be otherwise? The judges are appointed and sworn to administer the law, and, of necessity, they must decide what the law is. In doing this, they are obliged to look first to the supreme law to determine upon any conflict with it that may be alleged. This necessarily involves the right to declare an act of the legislature void wherever such conflict is found clearly to exist. (*Fletcher v. Peck*, 8 Cranch, 87.) But where, in the best judgment of the court, there is no collision, what then? Are the courts to look out some other standard; erect some ideal test, such as their own opinions of right and wrong, justice, or injustice, or the general principles of a free government, might suggest, and by that annul a solemn act of the law making power? The absurdity to which such a doctrine leads must at once condemn it with all right thinking men.”⁴

⁴ *R. R. v. County Court*, 1 Sneed, 668—671, *passim*.

SEC. 610. Such, then, are the limitations upon the right of courts to decide upon the true meaning of a constitution, and of an enacted law, as to its agreement therewith. But suppose there is a mistaken view, either of the constitutional provisions themselves, or of the relation of a statute to them, embodied in a long standing decision, or a series of decisions of such a nature as to enter into contracts and titles, are such errors open to review? We answer, not unless the error is both palpable and injurious. And, more especially, if there has been a tacit legislative acquiescence, under a decision setting aside an enactment as unconstitutional, a court will hesitate long before reinstating the law so condemned, even though the decision may have been a misguided one. Thus, in Indiana, an act was declared unconstitutional because of a failure to comply with a requirement that every act should embrace only one subject, which should be clearly set forth in the title. Several years passed by, and three sessions of the legislature were held, without adverting to the treatment the act had received from the court. The court, on the question coming up again, said, in regard to the binding force of the decision: "This very question was decided by this court against the validity of the enactment, more than five years ago, in *Igoe v. State*, 14 Ind., 239. Three legislatures have since held their sessions, and adjourned, we believe without even attempting to enact the provisions thus held void in a form which would be free from the constitutional objections' then adjudged to exist. Our citizens, upon the faith of that decision standing unquestioned so long, have unsuspectingly acted as agents for foreign insurance companies, without complying with an act supposed in good faith to be void, and so pronounced by the solemn judgment of the court of last resort. All classes have, upon the like faith, purchased and paid for indemnity covering, in the aggregate, probably millions in value. We ought, in any case, to proceed with great caution in reversing opinions heretofore pronounced by this court, and received and acted upon as settling the law, and especially when a rule of property

would be overturned, and that would be made criminal which had before been adjudged lawful. In such cases, it were often better that what is settled should not be disturbed by judicial action, though it be wrong. This principle has so often received the sanction of appellate courts, that it has become a maxim for their guidance, and it is especially important that it should not be forgotten here, where the judges hold for short terms and where, unfortunately, the entire court may be changed at once. If it be also remembered that the validity of every contract of insurance, and every policy issued in this state by foreign insurance companies, would be brought in question should we now overrule *Igoe v. State*, it will seem quite unfortunate, at least, if we shall feel compelled to do so,"⁵ However, the court proceeded to re-affirm the decision as actually correct.

SEC. 611. Moreover, if a statute is sustained by a decision of a nature to enter into the business relations of the citizens, the courts will be reluctant to examine the question again with reference not to the same but to a similar subject, even if the statute would probably be pronounced unconstitutional if the matter were open for examination. In a case of this kind, the Mississippi court held this doctrine, and thus explained its views thereon: "An elaborate argument has been made with a view of showing that the statute is unconstitutional, on the ground that the subject-matter of legislation belongs to the judicial, and not to the legislative department of the government. Perhaps if this were now an open question in this court, we would feel bound to yield to the force of the argument, and authorities cited by the counsel of the defendant in error. We do not, however, intend to intimate an opinion in this respect. The court, after much consideration and a careful examination of the authorities relating to the subject, sustained an act of the legislature, passed in 1821 [thirty-four years before the present opinion was written], in most of its provisions similar to the one now under consideration. The

⁵ *Grubbs v. The State*, 24 Ind., 296.

question is one solely of legislative power, and not of expediency. The question of power we regard as firmly settled by, the well considered opinion, in the case of *Williamson v. Williamson*, 3 S. & M., 744. Every consideration of policy admonishes us, even if we believed that there was room to doubt as to the correctness of the decision in that case, not to enter upon a review of it, nor to disturb it at this late day. All questions which have an important bearing upon titles to property, and which have, as in this instance, been once carefully considered and solemnly settled by this court, ought not to be treated as open for future investigation, unless it shall appear that the evil resulting from the principle established must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications upon the subject. This ought to be the inflexible rule by which a court of last resort should be guided, with reference to all questions which may be reasonably supposed to arise between parties in consummating a contract for the sale or purchase of real estate. The party proposing to sell may be supposed to exhibit either his title to the land, or his authority, if acting in the capacity of an agent, to make the sale. The purchaser, to judge of either, must look to the law as it exists at the time. The point for his consideration is, whether the party proposing to sell is clothed with legal authority to make the sale. The special act of the legislature is produced, and the question thereupon arises, had the legislature power to enact the law? The decision of this court is examined, and the question of power, after mature deliberation, decided and determined to be within the pale of legislation. It is, indeed, not venturing too far to presume that the party petitioning for the enactment of the law, the legislature in enacting it, and the party purchasing in virtue of the power thus conferred, all acted with reference to the law, as settled by the decision which we are now asked to overrule."⁶ And so, where the constitutionality of a "mill-dam act" was sustained by a decision, notwithstanding the act expressly took

⁶ *Boon v. Bowers*, 30 Miss., 256.

away the common law remedy for damages in the flowage of lands, and substituted a statutory remedy in lieu of it, and also treated the overflowing of lands by dams as a "public use," and also failed to provide for compensation for the appropriation of lands, and the decision sustaining it endured for a considerable length of time, and was followed by two or three others, the court confessed upon a final representation of the question of constitutionality, that were the matter available for consideration as a new question, it would, without doubt, decide the other way, but yet refused to open the investigation again, and said: "We are now asked to depart from that decision; ought we to do it? It is the duty of this branch of the government to pass finally upon the construction of a law, and determine whether the legislature in its action has transcended its constitutional limits; and the community has a right to expect with confidence we will adhere to decisions made after full argument and upon due consideration. The members of the court may change totally, every six years, and if each change in the organization produces a change in the decisions, and a different construction of laws under which important rights and interests have become vested, it is easy to see that the consequences will be most pernicious. For these, and other reasons, which might be given, we decline to reconsider the constitutionality of the mill-dam law."⁷

SEC. 612. And so, a decision was held to be inviolable which was based upon an erroneous assumption of the repeal of a certain colonial statute, because the opinion had been long prevalent, had been sanctioned by the courts, had been acquiesced in by the profession, and the decision adopting it had become, to some extent, a rule of property.⁸ But on a mere question of jurisdiction, concerning which the former decision clearly rested upon a mistaken reading of a certain statute, the error may and should be corrected.⁹

⁷ *Fisher v. Iron Co.*, 10 Wis., 355.

⁸ *Van Winkle v. Constantine*, 10 N. Y., 425.

⁹ *Romaine v. Kinshimer*, 2 Hilt., 521.

CHAPTER XLIV.

THE LAW OF THE CASE.

- Section 613.** Decisions must Govern the same Case throughout.
614. Even under a different state of Facts if substantially the same.
615. Binds both the Trial and Appellate Courts.
616. And even under new organization of Appellate Court.
617. And on second appeal after new trial below.
618. Facts found by Supreme Court must stand.
619. Unless the Facts on trial *de novo* materially change.
620. And on Questions of Jurisdiction.
621. Even if Decision contrary to the plainest principles of the Law.
622. Application to Equitable Questions.
623. And even if a Different Decision has been made in similar case.

SECTION 613. It is a settled principle that the questions of law decided on appeal to a court of ultimate resort, must govern the case in the same court, and the trial court, through all subsequent stages of the proceedings, and will seldom be reconsidered, or reversed, even if they appear to have been erroneous. "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed, or affirmed, or to be modified, or overruled, according to its intrinsic merits, but in the case in which it is made, it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves;"¹ and, that too, notwithstanding the prior decision may be "in abrogation of one of the plainest

¹ *Phelan v. San Francisco*, 20 Cal., 45.

principles of law,"² since nothing actually determined therein can be reviewed,³ except indeed in the prescribed manner of obtaining a direct rehearing on settled terms and conditions by a rule of the court.

SEC. 614. The Vermont court has very clearly laid down the general principle of the above doctrine, in a case presented with a different statement of facts, but, as the court held, without any *substantial* difference. The court said thereon: "The question is, will this court revise a former decision made by the same court, in the same cause, and on substantially the same state of facts? Such a decision presses itself upon the consideration of the court with a two-fold force; first, as an authority, as though it was a decision made in any other case; second, as an adjudication between the parties, not as one that is conclusive as a matter of law, for the court may revise and reverse it, but as an adjudication that practically is to be regarded as having much the same effect. The rule has been long established in this state, often declared from the bench, and, we believe, uniformly adhered to, that in the same cause this court will not reverse or revise their former decisions. It is urged, and there is force in the argument, that if there is error in the decision, and it is ever to be reversed, it should be done in the same court. Although this position may be sound in theory as applicable to a single case, yet, as a rule, to be acted upon in all cases, it would lead to incalculable mischief. If all questions that have ever been determined by this court, are to be regarded as still open for discussion and revision in the same cause, there would be no end to their litigation, until the ability of the parties or the ingenuity of their counsel were exhausted. A rule that has been so long established and acted upon, and that is so important to the practical administration of justice in our courts, we think should not be departed from. And whatever views the different members of this court may entertain as to the soundness of the former decision, we all

² *Davidson v. Dallas*, 15 Cal., 82, and cases cited.

³ *Rector v. Deanley*, 14 Ark., 307; *Washington Bridge Co. v. Stewart*, 3 How., 425.

agree that the doctrine there enunciated is to be regarded as the law of this case.”⁴

SEC. 615. And not only does the rule bind the appellate court, but also the lower, or trial court. And where this was, singularly enough, disputed, the court responded in unmistakable tones of determination that it would uphold its authority. Its language was: “This opinion of the Supreme Court, pronounced by the Chief Justice, would seem to be conclusive as to the right here sought to be enforced. But it is contended that the opinions pronounced by the Supreme Court are not of binding authority upon the Circuit Court, and it is intimated that though inferior courts may treat such opinions never so contemptuously, yet the mere *remittitur* certified and transmitted by our clerk, is the only authoritative direction to the court below. This is not the correct view of the law. It is not intended to be declared that all the reasoning and instances of illustration introduced into an opinion of this court, are to be adopted by inferior tribunals from which cases or matters may come here, by appeal, writ of error, or otherwise; but it is insisted and declared that the opinion of this court upon the points in judgment, presented and passed upon in cases brought here for adjudication, are the law of the land until overruled, or otherwise annulled, and that inferior courts and tribunals must yield obedience to the law thus declared. We should be unfaithful to the high trust committed to us, should we fail to discharge this solemn duty of enforcing the law, in this respect, upon the faithful and complete execution of which the most sacred and vital rights of the citizen must frequently depend; and every inferior officer, judicial or ministerial, must know and be informed that such acquiescence and obedience will be rigidly exacted, and resistance will be most effectually subdued.”⁵ An inferior court is compellable by peremptory writs to carry into effect the mandates and decisions of the higher court,⁶ so that the above was not, in any sense, a mere *brutum fulmen*.

⁴ *Stacy v. B. R.*, 32 Vt., 552.

⁵ *Att'y Gen. v. Lum*, 2 Wis., 514.

⁶ *Weed v. Wheeler*, 9 Tex., 128.

SEC. 616. A new organization of the court while a cause is pending, so that the new court is of a different opinion concerning the points of law decided therein, will not justify a departure. When once announced, a decision is the permanent law of the case, whether the court remains constituted of the same members, or not,⁷ or whether the members remain of the same mind, or not,⁸ until the whole matter is finally disposed of.⁹

SEC. 617. And this holds good even when there is a decision and reversal, and after a second trial the cause comes up on a second appeal.¹⁰ The court will not reconsider, nor in general even enlarge upon, or explain, the reasons which induced the decision before announced.¹¹ And so, where a Supreme Court remands a cause with directions as to what decree shall be entered, a party cannot, on a subsequent appeal, assign for error any cause that accrued prior to the former decision, although not passed upon before; because a party ought not to be allowed to have his cause partly heard at one time, and partly at another;¹² and besides it might result in two contradictory and repugnant judgments between the same parties.¹³ And, indeed, where a cause has been remanded with specific directions to enter up a particular decree, an appeal from that decree will not even be considered.¹⁴

SEC. 618. And where a Supreme Court finds certain *facts* from the evidence, and reverses and remands the cause merely to supply proof of a particular fact, the facts so found by the court will not be again investigated on a second writ of error.¹⁵

SEC. 619. Nevertheless, if the *facts change* on a second trial of the whole cause in the court below, after remanding, these may so change the nature of the case as to require a new decision as applicable thereto; and if so, the former decision

⁷ *Parker v. Pomeroy*, 2 Wis., 122.

¹² *Ogden v. Larrabee*, 70 Ill., 510.

⁸ *Hawley v. Smith*, 45 Ind., 183.

¹³ *Mathews v. Sands*, 29 Ala., 140.

⁹ *Hoffman v. State*, 30 Ala., 534.

¹⁴ *Rising v. Carr*, 70 Ill., 596.

¹⁰ *Thomason v. Dill*, 34 Ala., 177.

¹⁵ *Tuttle v. Garrett*, 74 Ill., 444.

¹¹ *Kibler v. Bridges*, 5 S. C., 336.

ceases, under the new development, to be the law of the case. For it is clear that a party on a re-trial *de novo* may introduce new evidence, and establish an entirely different state of facts to conform to which is no violation of principle in a court, even if thereby it does set aside its former decision as inapplicable, and adopt a new one as suited to the new phase of the controversy. But, even then, the former decision, so far as applicable, will be adhered to, and in no case can a second appeal, even after a complete new trial, bring up for review anything except the proceedings subsequent to the reversal,¹⁶ and a party will be held to the legal consequence of all questions decided previously, so that, if parties in ejectment enter into a stipulation as to an agreement on facts, which facts assume that at a certain time the title was in a third person, and the court is asked to pass upon the question which of the parties has acquired that title from the third person, and does pass upon it, neither of the parties will be allowed afterward to deny that the third person had any title, in order to avoid the effect of the decision. In such a case, the California court said: "The stipulation distinctly looked to the rendition of a final judgment, which should determine that Downer, or Bradley, the one or the other, had acquired the title in fee to the undivided quarter assumed and admitted to have been formerly vested in Yontz. We cannot regard it as reserving the question as to whether or not Yontz himself ever had the title, or as merely presenting the abstract question of the relative priority of the lien under which each claimed to have acquired that title for himself. It cannot be considered that it was the purpose of the parties to obtain the opinion of the court upon one abstract proposition, in the first instance; and then upon another, and so on, *ad infinitum*, as they may see proper to submit them, and to be followed, it may be, by no determination of the ultimate rights of either party. Our judicial system has not as yet provided for the establishment of moot courts, or made it our duty to solve legal conundrums for purposes of mere amusement or instruction."¹⁷

¹⁶Dodge v. Gaylord, 53 Ind., 365.

¹⁷Donner v. Palmer, 51 Cal., 637.

SEC. 620. The rule applies not only to questions of law arising in a case, but likewise to questions of jurisdiction, so that, after a decision affirming jurisdiction expressly, or after an implied decision of jurisdiction, arising from the court's proceeding to adjudge in the cause, the question of jurisdiction cannot be again opened in the cause.¹⁸

SEC. 621. A case came before the California Supreme Court, wherein the decision was announced that if a landlord without the consent of the tenant should enter upon the premises before the termination of the lease, and relet them to another, these acts would release the tenant from his covenant, except as to such part of the rent as had already accrued when the entry was made. The case afterwards came again before the court, when the exception noted above was adjudged palpably erroneous, and unjust; but, the decision being the law of the case, it was held it could not be disturbed. Said HEYDENFELDT, J.: "The latter portion of that decision is in abrogation of one of the plainest principles of law; and if this case was a new one, I would not hesitate to overrule it. But legal rules deprive us of the power to do so. The decision having been made in this case, it has become the law of the case, and is not now the subject of revision."¹⁹

SEC. 622. The rule is substantially the same in regard to equitable questions, but with a little relaxation, in Ohio, where it has been intimated that if the court is clearly satisfied of error, it will recant, even in the same case.²⁰ But usually, I apprehend, there is no material difference in the bearing of the rule upon legal and equitable decisions. And so, where a court decides that a judgment for divorce and alimony should not be set aside, but should be modified, the decree of divorce is final, and cannot be re-examined on a second appeal relating to the alimony.²¹

¹⁸*Clary v. Hoagland*, 6 Cal., 688; *Washington Bridge Co. v. Stewart*, 3 How., 413.

¹⁹*Dewey v. Gray*, 2 Cal., 377.

²⁰*Bane v. Wick*, 6 Ohio St., 13.

²¹*Hopkins v. Hopkins*, 40 Wis., 462.

SEC. 623. It does not matter that a different decision has actually been made in another case. As, for example, if an appellate court has declared a deed of trust to be void, that decision is the immutable law of the case, and must govern all subsequent proceedings therein, notwithstanding that, in another case, afterwards, a different decision is made on a similar deed.²² Where the court construes a will in reference to a certain title, and the same will, in regard to the same property is brought up for construction on the same questions in *another suit*, the former decision will be sustained, whether it be technically conclusive or not, *unless manifestly erroneous*. The Maryland court say: "We have not been able to discover a sufficient reason for making this an exception to the almost uninterrupted practice of all courts of receiving their own decisions as of binding force."²³ However, every court of record may vacate its judgments for good cause shown, but not because its own prior decisions are erroneous.

²²*Thompson v. Albert*, 15 Md., 285.

²³*Dugan v. Hollins*, 13 Md., 162.

CHAPTER XLV.

LIMITATIONS OF THE RULE OF STARE DECISIS.

Section 624. Rule not Inflexible.

- 625. Duty of Courts to Overrule Decisions
- 626. Especially those of a Subverting character.
- 627. General Principle.
- 628. Effect of Overruling Decisions.

SECTION 624. Nevertheless, the rule must not be so rigidly pressed as to shield error needlessly, or shut out advanced knowledge. This would establish rather the immobility of statutes, and make them like the laws of the ancient Medes and Persians than maintain merely the consistency and stability of legal principles. And so, if even a rule of property is established by a series of decisions, resulting, however, in a dangerous monopoly, and in effect setting aside a wholesome provision in the constitution designed to suppress such abuse of the rights of property, the rule thus established, may properly be abrogated, by overruling the decisions under which it grew up to so dangerous and overwhelming an influence in contravention of public policy.¹ And although prior decisions are not lightly to be departed from, yet any error may be corrected when no substantial injury is to be expected from the change,² or when the evils of adherence are manifestly greater than those of departure. It must, of course, be clear that there is an error, and, as we have seen, it is not sufficient that a present court would have decided the matter differently if it

¹*San Francisco v. S. V. W. W.*, 48 Cal., 509.

²*Gwin v. McCarrol*, 1 S. & M., 371.

were *res integra*.³ But where this is clear, and a plain rule of law is manifestly violated, and especially if the rule established is mischievous rather than beneficial to the community at large, in its practical operations, or to a particular class of community, as, for example, the holders of commercial paper, it should be abrogated without delay.⁴

SEC. 625. Indeed, it may, under certain circumstances, become as imperative a duty to arrest the damage resulting from the active power of a false principle, as, in other circumstances, to abide by the standards of doctrine established by deliberate consideration and sanctioned by long acquiescence and practical utility. Where a case arose, in which a prior decision was attacked on the ground that it had no support from the cases whence it purported to be derived, the court yielded, and said in regard to the right and duty of a court to correct errors, when practicable: "Do we violate the doctrine of *stare decisis* by now correcting the mistake, and going back to the well established doctrine which that case has disturbed? If we do, we commit a greater error than the one we have felt bound to correct; for that doctrine, though incapable of being expressed by any sharp and rigid definition, and therefore incapable of becoming an institute of positive law, is among the most important principles of good government. But, like all such principles, in its ideal it presents its medial and its extreme aspects, and is approximately defined by the negation of its extremes. The conservatism that would make the instance of to-day the rule of to-morrow, and thus cast society in the rigid moulds of positive law, in order to get rid of the embarrassing but wholesome diversities of thought and practice that belong to free, rational and imperfect beings; and the radicalism, that, in ignorance of the laws of human progress and disregard of the rights of others, would lightly esteem all official precedents and general customs that are not measured by its own idiosyncrasies; each of these extremes always tends to be con-

³*Bain v. Wick*, 6 Ohio St., 14.

⁴*McFarland v. Pico*, 8 Cal., 631.

verted into the other, and both stand rebuked in every volume of our jurisprudence.

"And the medial aspect of the doctrine stands everywhere revealed as the only practical one. Not as an arbitrary rule of positive law, attributing to the mere memory of cases higher honor and greater value than belong to the science and natural instinct and common feeling of right; not as withholding allowance for official fallibility, and for the changing views, pursuits and customs that are caused by, and that indicate, an advancing civilization; not as indurating and thus deadening the forms that give expression to the living spirit; not as enforcing 'the traditions of the elders' when they 'make void the law' in its true sense; nor as fixing all opinions that have ever been pronounced by official functionaries; but as yielding to them the respect which their official character demands and which all good education enjoins.

"When the varied surface of this earth is changed into a dead level, and the ocean's waves are still, then man will need another habitation. And when the variety of human action and development is subjected to judicial and legislative prescriptions, and the rule of man's free and educated reason is proscribed, with all its improving diversities, and all reasoning becomes illegal if the subject has been already reasoned upon by judges or decided upon by them without reasoning, then man will need another jurisprudence, and another legislation, without, perhaps, being capable of enjoying them.

"The doctrine of *stare decisis* is, indeed, one of the most important in the law; for in its simplicity, it expresses man's reverence for civil authority, and the demand of his nature that it shall be obeyed—and this feeling is the surest foundation of social order. It is the expression of the people's expectation that all government shall be administered with great care, and with a reasonable degree of consistency, and of their confidence that it is so; and it involves the injunction that official functionaries shall not, for light reasons, abandon the expressed judgments of themselves, or of their predecessors,

especially if any serious embarrassment of public order may be the consequence. It regards all governmental, and especially judicial, decisions, as the official representations of the public will, in relation to civil rights and duties, and as being entitled to respect and reverence for this simple reason. To these feelings and principles, we owe official reverence, and we desire to cherish it as a necessary element of social order and of judicial character.

"We do not violate it when we declare that a decision made four years ago, in opposition to all previous legislation, and jurisprudence, is open to correction. We should violate it by declaring that decision to be conclusive evidence of the law, and should, at the same time, announce a judicial heresy involving the assertion that judicial decisions are equivalent to positive law, and that courts not only apply the law, but make it. And how palpable would appear the violation when it should be noticed that the case which we establish is without any, and against all, precedent.

"If it should be said that the principle of the decision in *Ewing v. Furness* has entered into the customs and practice of the country, then the claim that it should stand as law would be founded upon a different principle expressed in the maxim *communis error facit jus*. If such a custom has arisen in this instance, it has had but a short life, and seemed but a frail title to perpetuity. And surely the fact that subordinate courts and officers may have been misled by the decision in some unknown instances in the application of the law can have no influence in converting the error into a rule of right. Official customs affect not usually rights themselves, but the means of securing them. The case of *Ewing v. Furness* must be regarded as a divergence from the beaten path of the law, and we cannot help to clear a new track in that direction; it is a plain error, and it is not our duty to set the stain that mischance has dropped upon the law."⁵

SEC. 626. Especially, as in the case above, where a decision

⁵ *Callender's Adm'r v. Insurance Co.*, 23 Pa. St., 474.

is of an interloping and subverting character in itself may it be properly annulled. And so an innovation upon the settled principles of commercial law, erroneous in itself, and mischievous in its results, should be set aside, and the true order of business relations be thereby restored. And, so the California court say, in this matter: "In overruling the case of *Bryan v. Berry*, we feel less reluctance, because we think that the principle there laid down is of injurious import. We think that principles of commercial law long established and maintained by a consistent course of decision in the other states should not be disturbed; that the tendency of such disturbance, in any instance, is to confusion and uncertainty, and gives rise to perplexing litigation, and doubts, and uneasiness in the public mind. Almost any general rule governing commercial transactions, if it has been long and consistently upheld as a part of the general system, is better than a rule superseding it, though the latter were much better as an original proposition. Men knowing how the law has been generally received and repeatedly adjudged, govern themselves, and are advised by their counsel, accordingly; but if courts establish new rules whenever they are dissatisfied with the reasons upon which the old ones rest, the standards of commercial transaction would be destroyed and commercial business regulated by a mere guess at what the opinion of judges for the time might be, and not by a knowledge of what the doctrines of recognized works of authority, and the precedents of the courts are. The commercial law has a system of its own, built up by centuries, and the wisdom of learned jurists all over the world. It is not local, but applicable to all the states with few modifications; and California, eminently commercial in her character and in close commercial connection with the other states, finds her interest and safety in adhering to the well-settled general rules which prevail in those states, as the laws of trade. We repeat, the stability and certainty of these rules are of more importance than any fancied benefits which might accrue from any innovation upon the system.

Innovation begets innovation; and we cannot always see with clearness what is to be the consequence of the new rule established. * * * * The doctrine of *stare decisis* seriously invoked by the respondent's counsel can have no effect, or if any, only the effect to induce us the more readily to return to a principle recognized, we believe, for many years, everywhere else in the commercial world. The conservative doctrine of *stare decisis* was never designed to protect such an innovation.”⁶

SEC. 627. The Wisconsin court thus states the general principle of overruling decisions: “When a question arises involving important private or public rights, extending through all coming time, has been passed upon on a single occasion, and which decision can, in no just sense, be said to have been acquiesced in, it is not only the right, but the duty of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny.”⁷ And the Nevada court cites, with approval, the forcible conclusion of the California court, on reviewing the authorities: “Apart from all express authority, reason must convince us that no such inexorable rule could exist. The rule itself implies that the doctrine protected by *stare decisis* cannot stand by itself. But it is a solecism to say that causes should be tried upon wrong principles—be decided against the law—whether it be for the purpose of justice, or not, so to decide them. The law is not so false to itself as to require its own permanent overthrow; unless the subversion be necessary to the public interests, and whether it be so necessary in a given case, or not, is for the court to decide as a matter of legal discretion, whenever the rule is invoked. For, as the rule of *stare decisis* is avowedly put upon the ground of policy, we cannot conceive that the application of the rule could be rightly so made as to overthrow the paramount public policy of deciding causes by the rules of the law, when these rules work and do equity in the major part of the cases to which they apply, and protect

⁶ *Aud v. Magruder*, 10 Cal., 291.

⁷ *Pratt v. Brown*, 3 Wis., 609.

the rights of the many against the claims of the few.”⁸ The Mississippi court say: “Yet even this backwardness to interfere with previous adjudications does not require us to shut our eyes upon all improvements in the science of the law, or require us to be stationary while all around is in progress.

* * * * Perhaps, no general rule can be laid down on the subject. The circumstances of each particular case, the extent of influence upon contracts, and interests, which the decisions may have had, whether it may be only doubtful or clearly against principle, whether sustained by some authority or opposed to all; these are all matters to be judged of whenever the court is called on to depart from a prior determination.”⁹

SEC. 628. As to the effect of overruling decisions, it is necessary, whenever practicable, to prevent the overruling from operating on vested rights already attached.¹⁰ And where this cannot be done, the change should always be left to the legislature.¹¹ And it rarely can be done where there are vested rights in real property, although with personal contracts it may be different, sometimes, at least.¹²

⁸ Cited in *Linn v. Minor*, 4 Nev., 467.

⁹ Ib.

¹⁰ *Hardigree v. Mitchum*, 51 Ala., 151.

¹¹ *Butler v. Van Wyck*, 1 Hill, 459.

¹² *Hollinshead v. Von Glahn*, 4 Minn., 190.

CHAPTER XLVI.

STARE DECISIS AS TO THE RELATIONS BETWEEN THE STATE COURTS AND THE UNITED STATES COURTS.

Section 629. Explanation of Relations.

- 630. Conflicts—Iowa Conflict at Large.
- 631. U. S. Court Unyielding therein.
- 632. Instances of Conformity.
- 633. Where State Court Affirms through Laches of Party.
- 634. No U. S. Common Law.
- 635. Rule as to Spanish and Mexican Laws.
- 636. Questions of Construction not passed on by State Courts.
- 637. Questions of Franchise.

SECTION 629. The rule under consideration has a reciprocal bearing upon the relations of state and national courts. These relations of course do not fall within our present compass, to their full extent, and, in general terms, they may be stated here, so far as the topic in hand requires, thus: In matters of the construction of United States laws, treaties or constitutional provisions, the authority of the United States courts is, of necessity, paramount; while *e converso* in the construction of state constitutions and state laws, the decisions of the courts of the particular state are paramount, and each is to follow the other in these respective spheres. The Mississippi court says of this relationship, in part: "While we entertain a proper respect for the opinions of the Supreme Court [of the United States] and are willing to yield to it the deference which is due to so distinguished a tribunal, yet when its decisions come in conflict with those of this court in relation to

questions over which the jurisdiction of this court is ample, and its decisions final, we feel bound to adhere to our own decisions. Any other rule would subject the opinions of this court to a degree of fluctuation and change greatly to be deplored. Retrospective legislation has always been deemed unjust and oppressive. Whenever courts of justice alter or change the rules of law they have once established, and on the faith of which contracts have been made, or rights acquired, many of the most injurious effects of retrospective legislation will result from such action.”¹

SEC. 630. From this extract, it is evident that it is not all smooth sailing in these waters. There is an occasional conflict, and I suppose it is true, in a measure, as is sometimes alleged, that there is a deep-seated jealousy on the part of state courts, in some quarters at least, and of many attorneys, that the United States Courts are inclined to be somewhat overbearing, and are, moreover, like the supposed maelstrom on the coast of Norway, disposed to draw into their vortex everything for leagues around; at first slowly and imperceptibly, but yet irresistibly.

I think some considerable space may well be occupied with an account of the comparatively recent collision between the Iowa court and the Supreme Court of the United States, in an adjudication concerning railroad bonds, in which the former administers a severe castigation to the latter as breaking over the bounds of precedent, and rule, and justice, and wantonly overriding the decisions by which it ought to have considered itself firmly bound. Many members of the profession may not have access to the United States and the Iowa reports, and even those who do may perhaps find it convenient to have the two sides of the judicial controversy brought into juxtaposition here.

The question was as to the authority of the city of Dubuque to issue bonds in aid of the construction of railroads, it being claimed that under the constitution of Iowa, the legislature

¹ *Shelton v. Hamilton*, 23 Miss., 498.

had no power to authorize such subscriptions. The court of Iowa, after sustaining the power by a number of decisions, finally overruled them all, and held that the power did not exist under the constitution. This the United States Courts refused to follow, and the Supreme Court charged the Iowa court with oscillating on the subject.² And Justice SWAYNE, delivering the majority opinion, thus rung out the challenge: "The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy; they exhaust the argument upon the subject; we could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject. It is urged that all these decisions have been overruled by the Supreme Court of the state, in the later case of *The State of Iowa ex rel. v. The County of Wapello*, 13 Iowa, 390, and it is insisted that in cases involving the construction of a state law, or constitution, this court is bound to follow the latest adjudication of the highest court of the state. *Leffingwell v. Warren*, 2 Black, 599, is relied upon as authority for the proposition; in that case, the court said it would follow 'the latest settled adjudications.' Whether the judgment can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions we think, are sustained by reason and authority; they are in harmony with the adjudications of sixteen states of the Union. Many of the cases in the other states are marked by the profoundest legal ability. The late case in Iowa, and two other cases of a kindred character in another state, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the

² *Gelpecke v. Dubuque*, 1 Wall., 205.

future, it can have no effect upon the past. ‘The sound and true rule is, that if the contract when made was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law.’ (*Life and Trust Co. v. Debolt*, 16 How., 432.) The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere; it is the law of this court; it rests upon the plainest principles of justice; to hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case. Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest, and exchange as claimed. We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts giving constructions to the laws and constitutions of their own states. It is the settled rule of this court, in such cases, to follow the decisions of the state courts. But there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice.”

In response to this formidable bugle call, there was a vigorous dissent entered, by way of a preliminary skirmish, by Justice MILLER, a citizen of the state whence the rejected decision had come demanding recognition. Although lengthy, the history of the matter requires to be given in full, the reasons for his dissent, which are clearly and forcibly set forth in his written opinion, and are, moreover, directly in the line of the elucidation of the topic treated in the present chapter, so that there is no digression therein from our direct design. I will dispense with quotation marks.

JUSTICE MILLER'S DISSENTING OPINION.

In the opinion which has just been delivered, I have not been able to concur. But I should have contented myself with the mere expression of dissent, if it were not that the principle on which the court rests its decision is one not only essentially wrong, in my judgment, but one which, if steadily adhered to in future, may lead to consequences of the most serious character. In adopting that principle, this court has, as I shall attempt to show, gone, in the present case, a step in advance of anything heretofore ruled by it on this subject, and has taken a position which must bring it into direct and unseemly conflict with the judiciary of the states. Under these circumstances, I do not feel at liberty to decline placing upon the records of the court, the reasons which have forced me, however reluctantly to a conclusion different from that of the other members of the court.

[The statement of the case is here omitted for the sake of brevity, it not being necessary to the purposes of this quotation.]

The Supreme Court, in a very elaborate and well-reasoned opinion, held that there was no constitutional power in the legislature to confer such authority on the counties, or on any municipal corporation. This decision was made in a case where the question fairly arose, and where it was necessary and proper that the court should decide it. It was decided by a full bench, and with unanimity. It was decided by the court of highest resort in that state; to which is confided, according to all the authorities, the right to construe the constitution of the state, and whose decision is binding on all other courts which may have occasion to consider the same question, until it is reversed or modified by the same court. It has been followed in that court by several other decisions to the same point, not yet reported. It is the law administered by all the inferior judicial tribunals in the state, who are bound by it beyond all question. I apprehend that none of my brethren who concur in the opinion just delivered, would go so far

as to say that the inferior state courts would have a right to disregard the decision of their own appellate court, and give judgment that the bonds are valid. Such a course would be as useless as it would be destructive of all judicial subordination.

Yet this is, in substance, what the majority of the court have decided.

They have said to the Federal Court sitting in Iowa: "You shall disregard this decision of the highest court of the state on this question. Although you are sitting in the State of Iowa, and administering her laws, and construing her constitution, you shall not follow the latest, though it be the soundest, exposition of its constitution by the Supreme Court of that state, but you shall decide directly to the contrary; and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. When it says bonds are void issued in that state, because they violate its constitution, you shall say they are valid because they do not violate its constitution."

Thus, we are to have two courts, sitting within the same jurisdiction, deciding upon the same rights, arising out of the same statute, yet always arriving at opposite results, with no common arbiter of their differences. There is no hope of avoiding this, if this court adheres to its ruling. For there is in this court no power in this class of cases, to issue its writ of error to the state court, and thus compel a uniformity of construction, because it is not pretended that either the statute of Iowa, or its constitution, or the decision of its courts thereon, are in conflict with the constitution of the United States, or any law or treaty made under it.

Is it supposed, for a moment, that this treatment of its decision, accompanied by language as unsuited to the dispassionate dignity of this court, as it is disrespectful to another court, of at least concurrent jurisdiction over the matter in question, will induce the Supreme Court of Iowa to conform its rulings to suit our dictation in a matter which the very frame and

organization of our government places entirely under its control? On the contrary, such a course pursued by this court, is well calculated to make that court not only adhere to its own opinion with more tenacity, but also to examine if the law does not afford them the means, in all cases, of enforcing their own construction of their own constitution, and their own statutes, within the limits of their own jurisdiction. What this may lead to, it is not possible now to foresee, nor do I wish to point out the field of judicial conflicts, which may never occur, but which, if they shall occur, will weigh heavily on that court which should have yielded to the other but did not.

The general principle is not controverted by the majority that to the highest courts of the state belongs the right to construe its statutes and its constitution, except where they may conflict with the constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such construction has been given by the state court, this court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled, and is as necessary to the harmonious working of our complex system of government, as the correlative proposition that to this court belongs the right to expound conclusively for all other courts the constitution and laws of the Federal Government.¹

But while admitting the general principle thus laid down, the court says it is inapplicable to the present case, because there have been conflicting decisions on this very point by the Supreme Court of Iowa, and that as the bonds were issued while the decisions of that court holding such instruments to be constitutional were unreversed, this construction of the constitution must now govern this court instead of the later one. The moral force of this proposition is unquestionably very great. And, I think, taken in connection with some fancied duty of this court to enforce contracts over and above that

¹ See *Shelby v. Guy*, 11 Wheat., 361; *McCluny v. Silliman*, 3 Pet., 277; *Van Rensselear v. Kearney*, 11 Howard, 297; *Webster v. Cooper*, 14 Id., 504; *Elmendorf v. Taylor*, 10 Wheat., 152; *The Bank v. Dudley*, 2 Pet., 492.

appertaining to other courts, [it] has given the majority a leaning towards the adoption of a rule which, in my opinion, cannot be sustained either on principle or authority.

The only special charge which this court has over contracts beyond any other court, is to declare judicially whether the statute of a state impairs their obligation. No such question arises here, for the plaintiff claims under and by virtue of the statute which is here the subject of discussion. Neither is there any question of the obligation of contracts, or the right to enforce them. The question goes behind that. We are called upon not to construe a contract, nor to determine how one shall be enforced, but to decide whether there ever was a contract made in the case. To assume that there was a contract, which contract is about to be violated by the decisions of the state court of Iowa, is to beg the very question in dispute. In deciding this question, the court is called upon, as the court in Iowa was, to construe the constitution of the state. It is a grave error to suppose that this court must or should determine this upon any principle which would not be equally binding upon the courts of Iowa, or that the decision should depend upon the fact that certain parties had purchased bonds which were supposed to be valid contracts when they really were not.

The Supreme Court of Iowa is not the first, or the only, court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be, in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid. Not only is the decision of the court, as I think, thus unsound in principle, but it appears to

me to be in conflict with its former decisions on this point, as I shall now attempt to show.

In the case of *Shelby v. Grey*,² a question arose on the construction of the statute of limitations of Tennessee. It was an old English statute, adopted by Tennessee from North Carolina, and which had, in many other states, received a uniform construction. It was stated on the argument, however, that the highest court of Tennessee had given a different construction to it, although the opinion could not then be produced. The court said that out of a desire to follow the courts of the state in the construction of their own statute, it would not then decide that question, but as the case had to be reversed on other points, it would send it back, leaving that question undecided.

In the case of *United States v. Morrison*,³ the question was whether a judgment in the State of Virginia was, under the circumstances of that case, a lien on the real estate of the judgment debtor. In the Circuit Court, this had been ruled in the negative, I presume by Chief Justice MARSHALL, and a writ of error was prosecuted to this court. Between the time of the decision in the Circuit Court and the hearing in this court, the Court of Appeals of Virginia had decided, in a case precisely similar, that the judgment was a lien. This court, by Chief Justice MARSHALL, said it would follow the recent decision of the Court of Appeals without examination, although it required the reversal of a judgment in the Circuit Court rendered before that decision was made.

The case of *Green v. Neal*⁴ is almost parallel with the one now under consideration, but stronger in the circumstances under which the court followed the later decision of the state courts in the construction of their own statutes. It is stronger in this, that the court there overruled two former decisions of its own, based upon former decisions of the state court of Tennessee, in order to follow a later decision of the state court after the law had been supposed to be settled for many years.

² *Shelby v. Guy*, 11 Wheat., 361.

⁴ *Green v. Neal*, 6 Pet., 291.

³ *U. S. v. Morrison*, 4 Pet., 124.

The case was one on the construction of the statute of limitations, and the Circuit Court, at the trial, had instructed the jury "that, according to the present state of decisions in the Supreme Court of the United States, they could not charge that defendant's title was made good by the statute of limitations." The decisions here referred to were the cases of *Patton v. Easton*,⁵ and *Powell v. Harman*.⁶ The first of these cases was argued in the February term, 1815, by some of the ablest counsel of the day, and the opinion delivered more than a year afterwards. In that opinion, Chief Justice MARSHALL recites the long dispute about the point in North Carolina and Tennessee, and says that it has at length been settled by the Supreme Court of the latter state by two recent decisions made after the case then before it had been certified to this court, and the court follows those decisions. This is re-affirmed in the second of the above mentioned cases.

In delivering the opinion in the case of *Green v. Neal*, Justice McLEAN says, that the two decisions in Tennessee referred to by Judge MARSHALL, were made under such circumstances that they were never considered as fully settling the point in that state, *there being contrariety of opinion among the judges*. The question, he says, was frequently raised before the Supreme Court of Tennessee, but was never considered as finally settled, until 1825; the first decision having been made in 1815. The opinion of Judge McLEAN is long, and the case is presented with his usual ability, and I will not here go into further details of it. It is sufficient to say that the court holds it to be the duty to abandon the first two cases decided in Tennessee, to overrule their own well considered construction in the case of *Patton v. Easton*, and its repetition in *Powell v. Green*, and to follow, without examination, the later decision of the Supreme Court of Tennessee, which is in conflict with them all.

At the last term of this court, in the case of *Leffingwell v. Warren*,⁷ my very learned associate, who has just delivered the

⁵ *Patton v. Easton*, 1 Wheat., 476. ⁷ *Leffingwell v. Warren*, 2 Black, 599.

⁶ *Powell v. Harman*, 2 Pet., 241.

opinion in this case, has collated the authorities on this subject, and thus, on behalf of the whole court announces the result: "The construction given to a state statute by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text * * *. If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decision, this court will follow the latest settled adjudication."⁸

It is attempted, however, to distinguish the case now before us from those just considered, by saying that the latter relate to what is rather ambiguously called a rule of property, while the former concerns a matter of contract. I must confess my inability to see any principle on which the distinction can rest. All the statutes of the states which prescribe the formalities and incidents to conveyances of real estate would, I presume, be held to be rules of property. If the deed by which a man supposes he has secured to himself and family a homestead fails to comply, in any essential particular, with the statute, or constitution of the state, as expounded by the most recent decision of the state court, it is held void by this court, without hesitation, because it is a rule of property, and the last decision of the state court must govern even to overturning the well considered construction of this court. But if a gambling stock-broker of Wall street buys, at twenty-five per cent. of their par value, the bonds issued to a railroad company in Iowa, although the court of the state, in several of its most recent decisions, have decided that such bonds were issued in violation of the constitution, this court will not follow that decision, but resort to some former one delivered by a divided court because, in the latter case, it is not a rule of property but a *case of contract*. I cannot rid myself of the conviction that the deed which conveys to a man his homestead, or other real estate, is as much a contract as the paper issued by a municipal corporation to a railroad for its worthless stock, and

⁸ *U. S. v. Morrison*, 4 Pet., 124; *Green v. Neal*, 6 Id., 291.

that a bond, when good and valid, is property. If bonds are not property, then half the wealth of the nation now so liberally invested in the bonds of the government, both state and national, and in bonds of corporations, must be considered as having no claim to be called property. And when the construction of a constitution is brought to bear upon the questions of property or no property, contract or no contract, I can see no sound reason for any difference in the rule for determining the question.

The case of *Rowan v. Runnels*,⁹ is relied on as furnishing a rule for this case, and support to the opinion of the court. In that case, the question was on the validity of a note given for the purchase of slaves imported into the State of Mississippi. It was claimed that the importation was a violation of the constitution of the state, and the note, therefore, void. In the case of *Groves v. Slaughter*,¹⁰ this court had previously decided that very point the other way. In making that decision, it had no light from the courts of Mississippi, but was called on to make a decision in a case of the first impression. The court made a decision with which it remained satisfied, when *Rowan v. Runnels* came before it, and which is averred by the court to have been in conformity to the expressed sense of the legislature and the general understanding of the people of that state. The court, therefore, in *Rowan v. Runnels*, declined to change its own rulings, under such circumstances, to follow a single later and adverse decision of the Mississippi court.

In the case now before the court, it is not called on to retract any decision it has ever made, or any opinion it has declared. The question is before the court for the first time, and it lacks, in that particular, the main ground on which the judgment of this court rested in *Rowan v. Runnels*. It is true, that the Chief Justice, in delivering the opinion in that case, goes on to say, in speaking of the decision of the state courts on their own constitution and laws: "But we ought not to give them

⁹ *Rowan v. Runnels*, 5 How., 134.

¹⁰ *Groves v. Slaughter*, 15 Pet., 440.

a retroactive effect, and allow them to render invalid contracts entered into with *citizens of other states*, which, *in the judgment of this court*, were lawfully made." I have to remark, in the first place, that this dictum was unnecessary, as the first and main ground was that this court could not be required to overrule its own decision when it had first occupied the ground, and when it still remained of the opinion then declared. Secondly, that the contract in *Rowan v. Runnels* was between a citizen of Mississippi on the one part, and a citizen of Virginia on the other, and the language of the Chief Justice makes that the ground of the right of this court to disregard the later decision of the state court; and, in this case, the contract was made between the city of Dubuque and a railroad company both of which mere corporations existing under the laws of Iowa, and citizens of that state in the sense in which that word is used by the Chief Justice. And thirdly, the qualification is used in the Runnels case that "*contracts were, in the judgment of this court, lawfully made.*" In the present case, the court rests on the former decision of the state court, declining to examine the constitutional question for itself. The distinction between the cases is so obvious as to need no further illustration.

The remaining cases in which the subject is spoken of may be mentioned as a series of cases brought into the Supreme Court of the United States by writ of error to the Supreme Court of Ohio, under the 25th section of the Judiciary Act. In all these cases, the jurisdiction of the Supreme Court of the United States was based upon the allegation that a statute of Ohio imposing taxes upon bank corporations was a violation of a previous contract made by the state with them, in regard to the extent to which they should be liable to be taxed. In the argument of these cases, it was urged that the very judgments of the Supreme Court of Ohio, which were then under review, being the construction placed by the courts of that state on their own statutes and constitution, should be held to govern the Supreme Court of the Union, in the exercise of its acknowledged right of revising the decision of the

state court in that class of cases. It requires but a bare statement of the proposition to show that if admitted, the jurisdiction of the Federal Supreme Court to set as a revising tribunal over the state courts in cases where a state law is supposed to impair the obligation of a contract, would be the merest sham.

It is true, that in the extract given in the opinion of the court just read from the case of the *Ohio Trust Co. v. Debolt*, language is used by Chief Justice TANEY susceptible of a wider application. But he clearly shows that there was in his mind nothing beyond the case of a writ of error to the supreme court of a state; for he says, in the midst of the sentence cited, or in the immediate context: "The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the court brings up here for revision." Besides, in the opinion thus cited, the Chief Justice says, in the commencement of it, that he only speaks for himself and Justice GRIER. The remarks cited, then, were not the opinion of the court, were outside the record, and were evidently intended to be confined to the case of a writ of error to the court of a state where it was insisted that the judgment sought to be revised should conclude this court.

But let us examine, for, a moment, the earlier decisions in the state court of Iowa, on which this court rests with such entire satisfaction.

The question of the right of municipal corporations to take stock in railroad companies came before the Supreme Court of Iowa, for the first time, at the June Term, 1853, in the case of *Dubuque County v. The Dubuque and Pacific R. R. Co.*¹¹ The majority of the court, KINNEY, J., dissenting, affirmed the judgment of the court below, and in so doing must necessarily have held that municipal corporations could take stock in railroad enterprises. The opinions of the court were by law filed with the clerk, and by him copied into a book kept

¹¹ *Dubuque Co. v. Dubuque & Pacific R. R.*, 4 Greene (Iowa), 1.

for that purpose. The dissenting opinion of Judge KINNEY—a very able one—is there found in its proper place, in which he says he has never seen the opinion of the majority. No such opinion is to be found in the clerk's office, as I have verified by a personal examination. Nor was it ever seen until it was published five years afterwards, in the volume above referred to by one of the judges who had ceased to be either judge or official reporter at the time it was published. Shortly after this judgment was rendered, Judge KINNEY resigned; and his place was supplied by Judge HALL. The case of the *State v. Bissell*¹² then came before the court, in 1854. In this case, after disposing of several questions relating to the regularity of the proceedings in issuing bonds for a railroad subscription, Judge HALL, who delivered the opinion of the court, then refers to the right of the county to take stock, and issue bonds for railroad purposes. He says: "This point is not urged, and the same question having been decided at the December Term of this court, in 1853, in the case of *The Dubuque and Pacific R. R. Co. v. Dubuque County*, is not examined. This decision is not intended to sanction or deny the legal validity of that decision, but to leave the question where that decision left it." It is clear that if Judge HALL had concurred with the other two judges, no such language as this would have been used, but they would have settled the question by a unanimous opinion. In the case of *Clapp v. Cedar County*¹³ the question came up again in the same court composed of new judges. The Chief Justice, WRIGHT, was against the power of the counties to subscribe stock, and delivered an able dissenting opinion to that purport. The other two judges, however, while in substance admitting that no such power had been conferred by law, held that they must follow the decision in the Dubuque case. Several other cases followed these, with about the same result, up to 1859, WRIGHT always protesting, and the other judges overruling him. In 1859, in the case of *Stokes v. Scott Co.*,¹⁴ which was an

¹² *State v. Bissell.*, Id., 328.

¹⁴ *Stokes v. Scott County*, 10 Iowa, 166.

¹³ *Clapp v. Cedar Co.*, 5 Id., 15

application to restrain the issue of bonds voted by the county, Judge STOCKTON said that, in a case like that, where the bonds had not passed into the hands of *bona fide* holders, he felt at liberty to declare them void, and, concurring with Judge WRIGHT, that far they so decided; Judge WRIGHT placing his opinion upon a want of constitutional power in the legislature. Finally, in the case of the *State of Iowa ex relatione v. Wapello County*, the court, now composed of WRIGHT, LOWE and BALDWIN, held, unanimously, that the bonds were void absolutely, because their issue was in violation of the constitution of the State of Iowa. The opinion in that case, delivered by Judge LOWE, covers the whole ground, and after an examination of all the previous cases, overrules them all except *Stokes v. Scott County*. It is exhausting, able, and conclusive; and after a struggle of seven or eight years, in which this question has been always before the court, and never considered as closed, this case may now be considered as finally settling the law on that subject in the courts of Iowa. It has already been repeated in several cases not yet reported. It is the first time the question has been decided by a unanimous court. It is altogether improbable that any serious effort will ever be made to shake its force in that state; for, of the nine judges who have occupied the bench while the matter was in contest, but two have ever expressed their approbation of the doctrine of the Dubuque County case.

Comparing the course of decisions of the state courts in the present case with those upon which this court acted in *Green v. Neal*, how do they stand? In the latter case, the court of Tennessee had decided, by a divided court, in 1815, and that decision was repeated several times but with contrariety of opinion among the judges up to 1825, when the former decisions were reversed. In the cases which we have been considering from Iowa, the point was decided in 1853, by a divided court; it was repeated several times up to 1859, by a divided court, under a continuous struggle. In 1859, the majority changed to the other side, and, in 1862, it became unanimous.

In the Tennessee case, this court had twice committed itself to the decision first made by the courts of that state, yet it retracted, and followed the later decision, made ten years after. In the present case, this court, which was not committed at all, follows decisions which were never unanimous, which were struggled against and denied, and which had only six years of judicial life, in preference to the later decisions commenced four years ago and finally receiving the full assent of the entire court.

I think I have sustained, by this examination of the cases, the assertion made in the commencement of this opinion, that the court has, in this case, taken a step in advance of anything heretofore decided by it on this subject. That advance is in the direction of a usurpation of the right which belongs to the state courts to decide as a finality upon the construction of state constitutions and state statutes. This invasion is made in a case where there is no pretense that the constitution as thus construed is any infraction of the laws or constitution of the United States. The importance of the principle, thus for the first time asserted by this court, opposed as it is to my profoundest convictions of the relative rights, duties and comities of this court, and the state courts, will, I am persuaded, be received as a sufficient apology for placing on its record, as I now do, my protest against it.

In a later case (1868), the Supreme Court of Iowa took up the gauntlet in handsome style, and the history of the matter requires some extracts from the opinion on the controverted point. The course of the decisions is given very similarly to the examination of the same in Justice MILLER's dissenting opinion, so that I need not recur to it. And I shall only give such portions as bear on the collision more directly, omitting as before the quotation marks.

Extract from the opinion of the Supreme Court of Iowa, on the ruling of the Supreme Court of the United States:¹⁵

Such being the history and the condition of the adjudications of this question, in Iowa, the case of *Gelpecke v. The*

¹⁵ *McClure v. Owen*, 26 Iowa, 253.

City of Dubuque, 1 Wallace, 202, was determined in the United States Supreme Court, wherein the later rulings of this court are disregarded, and the earlier and overruled decisions are followed. The only point determined in that case, which we will notice, is this one, that in case of conflicting decisions of state courts giving construction to the laws and constitution of their own states whereby contracts are affected, the federal courts will follow the decisions which obtained at the date of the contract. A brief reference to the decisions of the Supreme Court of the United States will determine whether this is in accordance with the prior rulings of that court.

The settled construction of a state statute by the Supreme Court of that state is a part of the statute, and will be followed by the federal courts.¹⁶

Such a decision will be followed by the United States Supreme Court, though not in accordance with its opinion.¹⁷

The decision of the state Supreme Court settling a rule of construction of devises of lands, is binding upon the federal courts.¹⁸

So is a decision of the state courts upon a state law of descents.¹⁹ So upon the statute of uses.²⁰

The decisions of state courts affecting the titles of lands, are binding authorities upon the courts of the United States.²¹

If the highest judicial tribunal of a state adopt new views as to the proper construction of a statute, and reverse its former decision, the federal courts will follow the latest settled adjudications.²²

¹⁶ *Massingill v. Downs*, 7 How., 767; *Nesmith v. Sheldon*, Id., 812; *Van Rensselear v. Kearney*, 11 Id., 297; *Webster v. Cooper*, 14 Id., 504; *Shelby v. Guy*, 11 Wheat., 367.

¹⁷ *McKeen v. DeLancy's Lessee*, 5 Cranch., 22.

¹⁸ *Jackson v. Chew*, 12 Wheat., 167; *Henderson v. Griffin*, 5 Pet., 151.

¹⁹ *Gardner v. Collins*, 2 Pet., 58.

²⁰ *Henderson v. Griffin*, 5 Pet., 151.

²¹ *Rundel v. Canal*, 14 How., 93; *Polk's Lessee v. Wendell*, 9 Cranch., 87; *Thatcher v. Powell*, 6 Wheat., 119; *Elmendorf v. Taylor*, 10 Id., 152; *Ross v. Barland*, 1 Pet., 655.

²² *U. S. v. Morrison*, 4 Pet., 124; *Greene v. Neal's Lessee*, 6 Id., 291; *Leffingwell v. Warren*, 2 Black., 599.

Other cases decided in the same court, sustaining the principles above stated, could be cited.

In *Grcene v. Neal's Lessee*, the United States Supreme Court overruled two of its own decisions, in order to follow the decision of a state court upon the construction of a state statute. Justice McLEAN, in delivering the opinion of the court, uses the following language, which is quite pertinent in the discussion of the question now under consideration. "In a great majority of the causes brought before the federal tribunals, they are called to enforce the laws of the state. The rights of the parties are determined under those laws, and it would be a strange perversion of principle if the judicial exposition of those laws by the state tribunals should be disregarded." In discussing the question whether it is obligatory upon the federal courts to change their rulings so as to conform to a subsequent decision of the state court, he uses the following forcible argument: "If the construction of the highest judicial tribunal of a state forms a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute, and why should not the same rule apply when the judicial branch of the state government in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it? The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law, and yet they reject the exposition of that law, which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act, which was adopted by the federal court. The inquiry is, what is the settled law of the state at the time the decision is made? This constitutes the rule of property within the state, by which the rights of litigant parties must be determined."

It is a noteworthy fact that the feeble *dictum* [of Chief Justice TANEY in *The Ohio etc. Co. v. Debolt*], is absolutely the only authority cited by Mr. Justice SWAYNE, in support of the ruling of the court in *Gelpecke v. The City of Dubuque*, a ruling that sets at naught the settled adjudications of the supreme tribunal of a state in the construction of its constitution. This one *dictum* is the only authority relied upon for this stretch of judicial power by the federal court, as alarming as it is regardless of precedents in that very court.

It will be observed that while it is quite true several decisions of this court, which by no means, as we have seen, settled the questions involved, are overruled by the series of adjudications declaring the county and city railroad bonds void, the Supreme Court of the United States, in sustaining them, have overruled many cases in that court of well established authority, and disregarded principles at the very foundation of the federal judicial power; without the restraining influence of which, the country will be launched upon the stormy sea of judicial conflict between state and federal courts, or will avoid this by succumbing to the decrees of one great federal arbiter of judicial questions.

While *Gelpecke v. The City of Dubuque*, as we have seen, is unsupported by authority, the opinion professes to be planted, in its own language, upon "truth, justice and law." These, according to the theory of our jurisprudence, are to be found in the settled adjudications of the courts, and when judges leave the well trodden path of precedent, they are apt to find error and injustice. Courts cannot, with safety, disregard the law as established by a course of adjudications. While such decisions may, in some cases, attain the ends of justice, the probability is they will work quite a different result, and by disturbing precedents will have the general effect of undermining the very fabric of our system of jurisprudence. Not only is the decision under consideration remarkable for bold disregard of precedent, but it is distinguished from all other decisions of the august tribunal that

rendered it, as well as from those of all other high courts, in the use of language extremely disrespectful toward the Supreme Court of a state. It is to be hoped that it may not be followed as a precedent for like offenses against judicial propriety.

SEC. 631. Notwithstanding the conflict above narrated, the Supreme Court of the United States has reaffirmed the new rule²³ in a number of subsequent cases, and some quite recent.

SEC. 632. It belongs to the states to decide questions of land titles as to real estate, including registry of deeds, within their limits respectively. But it has been held that if such titles depend upon any compact between states, they then partake of an international character, and the rule of decision will not be drawn from either of the states.²⁴ And it has also been held that decisions relating to the *construction* of a will, or a deed, or relating to commercial law, are not binding on the United States courts,²⁵ for the decision, to be binding, must relate to the construction of statutes, or of the state constitution. And so of cases depending on the general principles of equity jurisprudence.²⁶ And, moreover, it has also been held that the judgment of a state court where jurisdiction was not acquired by the common law, but by a statute which was repealed by the rendition of judgment by the adoption of a treaty.²⁷

Where any principle of law establishing a sale of real property is settled by a state court, the same rule will be followed by the United States courts, in analogous cases.²⁸ And so, where a state court decides that a corporation chartered by the state has violated its charter in taking a particular mortgage, the courts of the United States in a suit upon

²³ *Supervisors v. Schenck*, 5 Wall., 772.

²⁴ *Marlatt v. Silk*, 11 Pet., 1.

²⁵ *Lane v. Vick*, 3 How., 464; *Foxcraft v. Mullett*, 4 How., 353; *Thomas v. Hatch*, 2 Sumn., 170; *Robinson v. Insurance Co.*, 2 Sumn., 220; *Williams v. Insurance Co.*, Id., 270; *Insurance Co. v. Younger*, 2 Curt, 322.

²⁶ *Russell v. Southard*, 12 How., 159; *Neves v. Scott*, 13 How., 268.

²⁷ *Denn v. Harnden*, Paine, 55.

²⁸ *Williamson v. Suydam*, 6 Wall., 723.

the mortgage will follow the ruling.²⁹ Also, they will follow a state decision that the statutes require the payment of taxes to be made in gold and silver coin.³⁰ And so, where a bill in equity alleged that a school tax levied upon the real estate of the complainant was contrary to the true intent and meaning of a law of the state, which exempted his property from all state taxes, and also conflicted with the terms and conditions on which he held his lands by lease from an educational institution, and the state court dismissed the bill, it was held by the Supreme Court of the United States that it had no power to review the decision.³¹

SEC. 633. Where the judgment of a lower court was affirmed by the state appellate court for the reason that no transcript of the record was filed therein, the Supreme Court of the United States refused to review such affirmance, although the party announced his intention to raise a national constitutional question in the cause.³²

SEC. 634. There is no common law of the United States. And, therefore, the United States courts are governed by the rules of the common law as adopted and declared in particular states, in which the controversy arose.³³

SEC. 635. The rule applies also to former Spanish and Mexican laws. On this, I avail myself of a syllabus, as a fair statement of the principle, namely: "The Mexican colonization law, of August 18th, 1824, though general to the Republic of Mexico, was, so far as it affected lands within the limits of Texas, after the independence of that country, a local law of the new state, as much so as if it had originated in her legislation. The interpretation, therefore, placed on it by the highest court of the state must be accepted as the true interpretation, so far as it applies to titles to lands in that state, whatever may be the opinion of this court of its original soundness. If in courts of other states carved out of territory since acquired from Mexico, a different interpretation has been

²⁹ *Smith v. Kernochan*, 7 How., 198. ³² *Matheson v. Bank*, 7 How., 260.

³⁰ *Lane Co. v. Oregon*, 7 Wall., 71. ³³ *U. S. v. Garlinghouse*, 4 Ben., 205.

³¹ *Smith v. Hunter*, 7 How., 738

adopted, the courts of the United States will follow the different ruling so far as it affects titles in those states. The interpretation, within the jurisdiction of a state, of a local law, becomes a part of that law, as much so as if incorporated in the body of it by the legislature. If different interpretations are given in different states, to a similar law, that law, in effect, becomes, by the interpretations, so far as it is a rule for action by this court, a different law in one state from what it is in another.”³⁴ And so, where a state court decided concerning the boundaries of a Spanish grant made in 1807, near Mobile, and recognized in 1819, by Congress, the decision being made in a suit brought against the claimants under the grant by a party claiming under an act of Congress of 1829, confirming an incomplete Spanish concession, the United States Supreme Court held that it had no jurisdiction to review the decision.³⁵

SEC. 636. But questions are likely to arise relating to construction, which have never been passed on by a state court. What is the rule which governs such cases? A court of the United States is very reluctant to pioneer the way in such matters, and, if possible, will even order a case to lie over to await a decision in a pending cause before a state court.³⁶ But if compelled to make the first decision, even in a matter of title, it will do so as if such action was within their ordinary province.³⁷ And where the Supreme Court of the United States announce such pioneer decision, the circuit courts will be expected to follow it, until revised and changed by the Supreme Court, even if the state court afterwards announces a contrary decision on the same point.³⁸ And it is even held that the Supreme Court itself will not readily relinquish its claim to priority in such a case.³⁹

SEC. 637. Questions of franchise, such as the right to navigate a ferry, are held to pertain to property, so that state courts may make binding decisions upon them.⁴⁰ And where

³⁴ *Christy v. Pridgeon*, 4 Wall., 196. ³⁸ *Neal v. Green*, 1 McLean, 18.

³⁵ *Kennedy v. Hunt*, 7 How., 586. ³⁹ *Pease v. Peck*, 18 How., 598.

³⁶ *Springer v. Foster*, 2 Story, 386. ⁴⁰ *Conway v. Taylor*, 1 Black., 603.

³⁷ *Loring v. Marsh*, 2 Cliff., 469.

the highest courts of New York decided, in construing the statutes of limitation of that state, that a foreign corporation could not invoke the protection thereof, even if it was the lessee of a railroad in the state, and had property there, and a managing agent resident and keeping an open office, it was held, that this construction of the statute was binding on the United States courts, even if they considered it unsound.⁴¹

⁴¹ *Tioga R. R. v. Blossburg R. R.*, 20 Wall., 137.

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